

No. 87-775-ADX
Status: GRANTED

Title: United Families of America, Appellant
v.
Chan Kendrick, et al.

Docketed:
November 10, 1987

Court: United States District Court
for the District of Columbia

Vide:
87-253
87-431
87-462

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Counsel for appellee: Solicitor General, Benshoof, Janet

NOTE* Notice of Appeal filed 9/11/87

Entry	Date	Note	Proceedings and Orders
1	Nov 10 1987	G	Statement as to jurisdiction filed.
2	Dec 10 1987		Memorandum of appellee United States filed.
3	Dec 16 1987	X	Memorandum of appellee Chan Kendrick filed.
4	Dec 16 1987		DISTRIBUTED. January 8, 1988
6	Jan 7 1988		Brief amicus curiae of National Right to Life Committee, Inc. filed.
9	Jan 7 1988		Brief amici curiae of Catholic League for Religious and Civil Rights, et al. filed. VIDEDED.
5	Jan 11 1988		PROBABLE JURISDICTION NOTED. The case is consolidated with No. 87-253, Bowen v. Kendrick, No. 87-431, Bowen v. Kendrick and No. 87-462, Kendrick v. Bowen. A total of one hour is allotted for oral argument in these cases. *****
7	Jan 16 1988	G	Motion of the Solicitor General for divided argument filed.
8	Jan 25 1988		Motion of the Solicitor General for divided argument GRANTED.
10	Jan 29 1988		Application for leave to file appellees' brief in excess of page limitation granted by Rehnquist, C.J., On Jan. 29, 1988. Brief not to exceed 60 pages.
11	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 30, 1988. (1st case). This case is consolidated with 87-253, 87-431 and 87-462. 1 hour.
13	Feb 12 1988		Brief amicus curiae of Council on Religious Freedom filed. VIDEDED.
16	Feb 12 1988		Brief amici curiae of National Coalition for Public Education, et al. filed. VIDEDED.
12	Feb 13 1988		Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed. VIDEDED.
14	Feb 13 1988		Brief amici curiae of Unitarian Universalist Association, et al. filed. VIDEDED.
15	Feb 13 1988		Lodging receivied. (11 copies).
17	Feb 13 1988		Brief amici curiae of American Public Health Assn., et al. filed. VIDEDED.
18	Feb 13 1988		Brief of appellees Chan Kendrick, et al. filed. VIDEDED.
19	Feb 13 1988		Brief amici curiae of Anti-Defamation League of B'nai B'rith, et al. filed. VIDEDED.
20	Feb 23 1988		CIRCULATED.
21	Feb 23 1988	X	Reply brief of appellant United Families of America filed. VIDEDED.

Entry	Date	Note	Proceedings and Orders
22	Feb 23 1988	X	Reply brief of appellant Bowen, Sec. HHS, et al. filed. VIDED.
23	Mar 4 1988	X	Reply brief of appellants Chan Kendrick, et al. filed. VIDED.
24	Mar 30 1988		ARGUED.

87-775

No. 87-

Supreme Court, U.S.
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Supreme Court of the United States
OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA,
v.
Appellant,

CHAN KENDRICK, *et al.*

**On Appeal from the United States District Court
for the District of Columbia**

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Congress may involve religiously-affiliated organizations, "as appropriate," along with other charitable organizations, voluntary associations, and private sector groups, in a grant program designed to support projects to discourage adolescent pregnancy and to provide care for pregnant adolescents. See the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*
2. Whether the district court erred in excluding from participation in the program all religiously-affiliated organizations, including organizations that are not "pervatively sectarian" under this Court's definition.
3. Whether the district court erred in excluding religiously-affiliated organizations from participating in social welfare aspects of the program not directly related to education or counseling.

(i)

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Otis R. Bowen, Secretary of Health and Human Services, was defendant in the district court; Sammie J. Bradley and Katherine K. Warner were defendant-intervenors in the district court; and Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress were plaintiffs in the district court.

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IN THE
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No. 87-

UNITED FAMILIES OF AMERICA,
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**On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The April 15, 1987 opinion of the district court is reported at 657 F.Supp. 1547 (D.D.C. 1987). It is reproduced as Appendix A to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 1a-46a). The August 13, 1987 final judgment of the district court is unreported. It is reproduced as Appendix D to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 52a-55a).

JURISDICTION

On April 15, 1987, the district court entered an interlocutory opinion and order, holding that the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (the "AFLA"), is unconstitutional on its face and as

applied “*insofar as religious organizations are involved in carrying out the programs and purposes of the Act*” (U.S. J.S. App. 2a n.2 (emphasis in original)). The district court issued a final order and opinion on August 13, 1987, incorporating the April 15 opinion, severing the term “religious organizations” from the AFLA “in all places that it appears,” and permitting continued AFLA funding to non-religious organizations (U.S. J.S. App. 52a-55a). This order also dismissed the case from the district court’s docket.

On September 11, 1987, United Families of America filed a notice of appeal from the court’s final judgment of August 13, 1987 (App. B, *infra*). This Court has jurisdiction pursuant to 28 U.S.C. 1252 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

U.S. Const. amend. I.

The Congress finds that—

* * * *

(8) (B) such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

* * * *

(10) (C) services encouraged by the Federal Government should promote the involvement of parents

with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations;

42 U.S.C. 300z(a)(8)(B), 300z(a)(10)(C).

(a) The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. Demonstration projects shall, as appropriate, provide, supplement, or improve the quality of such services. Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems, such as other family members, friends, religious and charitable organizations, and voluntary associations.

42 U.S.C. 300z-2(a).

(a) An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include . . .

(21) a description of how the applicant will, as appropriate in the provision of services— . . .

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

42 U.S.C. 300z-5(a)(21)(B).

STATEMENT OF THE CASE

1. In 1981, Congress enacted the Adolescent Family Life Act ("AFLA") as Title XX to the Public Health Service Act, Pub.L.No. 97-35, 95 Stat. 578 (1981).¹ The AFLA was enacted in response to Congress's finding that "in 1978, an estimated one million one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock." 95 Stat. 578. Congress declared that "the Federal Government has a responsibility to help States develop adequate approaches to the serious and increasing problems of adolescent premarital sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 4 (1981). The purposes of the Act are to help adolescents "within the context of the family," to "promote self discipline and other prudent approaches" to adolescent pregnancy, to "promote adoption as an alternative," to promote the delivery of care services, to encourage research and demonstration projects, to sup-

¹ The AFLA replaced Title VI of the Health Services and Centers Amendments, Pub. L. No. 95-626, 92 Stat. 3551 (1978). Title VI was designed to "expand and improve the availability of, and access to, needed comprehensive community services" (*id.*, § 601(b)(1)). Title VI identified two primary sets of services. "Core services," which "shall be provided by all grantees," included "pregnancy testing, maternity counseling, and referral services," "primary and preventive health services," "educational services in sexuality and family life (including sex education), and including family planning information" (*id.*, § 602(4)). "Supplemental services," which "may be provided" (*id.*, §§ 602(4), 602(5)), included child care, consumer education and homemaking, counseling for family members, and transportation. *Id.*, § 602(5). The Secretary was required to give priority to applicants who would use existing community services and involved "the community to be served, including public and private agencies, adolescents, and families, in the planning and implementing of the project." *Id.*, § 605(a)(7). Religious organizations were eligible, and in fact were awarded grants, under Title VI. S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).

port "evaluative research," and, finally, to "encourage and provide for the dissemination of results" from the projects. 42 U.S.C. 300z(b).

The AFLA "authorizes appropriations for demonstration grants to individuals, public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981). Five categories of service are defined under the Act. "Necessary services" include 17 different services that, despite their name, "may be provided by grantees. . ." 42 U.S.C. 300z-1(a)(4) (A)-(P).² "Core services" are "those services which shall be provided by a grantee." *Id.*, § 300z-1(a)(5).³ "Supplemental services" are "those services which may be provided by a grantee." *Id.*, § 300z-1(a)(6). "Care services" are "necessary services for the provision of care" and "include[] all core services" for care prescribed by the Secretary. *Id.*, § 300z-1(a)(7). Finally, "preventive services" are "necessary services to prevent adolescent sexual relations." *Id.*, § 300z-1(a)(8).

No grants under the AFLA may be made for projects that provide abortion, abortion counseling, or abortion referral (unless such referral is requested by the adoles-

² These include: (A) pregnancy testing and maternity counseling, (B) adoption counseling and referral, (C) primary and preventive health services, including prenatal and postnatal care, (D) nutrition information and counseling, (E) referral for venereal disease, (F) referral for pediatric care, (G) educational services relating to premarital sex, (H) educational and vocational services, (I) referral to residential care, (J) mental and physical health services and referral, (K) child care, (L) consumer education, (M) counseling for family members, (N) transportation, (O) outreach services to families, (P) family planning services, (Q) other services that the Secretary approves by regulation. 42 U.S.C. 300z-1(a)(4).

³ The AFLA does not expressly define the "core services" which "shall" be provided, but leaves these to be defined by regulation. 42 U.S.C. 300z-1(b).

cent and her parent or guardian),⁴ and AFLA funds may not be used for the provision of family planning services (unless such services are otherwise unavailable in the community). 42 U.S.C. 300z-10(a); *id.*, § 300z-3(b)(1).

The AFLA requires each applicant for a grant to describe how it will involve in the program, "as appropriate in the provision of services, . . . religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" 42 U.S.C. 300a-5(a)(21)(B). In practice, only 25% of the grantees have been religiously affiliated (Decl. of Jo Ann Gasper, May 12, 1987).

In the legislative history the authorizing committee stated that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, 98th Cong., 2d Sess. 10 (1984). To enforce this limitation on the use of funds, the Secretary attaches a proscription to the Notice of Grant Awards forbidding grantees to use AFLA funds to "teach or promote religion." U.S. J.S. App. 29a n.13. On at least one occasion, a religious organization was dropped from the program for violation of program restrictions (Decl. of Jo Ann Gasper, Oct. 21, 1985).

In initiating the AFLA program in 1981 and in reauthorizing it in 1984, Congress considered possible conflicts with the Establishment Clause and concluded that the program comported with constitutional standards. S. Rep. No. 97-161, 97th Cong., 1st Sess. 15-16 (1981); S. Rep. 98-496, 98th Cong., 2d Sess. 9-10 (1984). "Re-

⁴ This section "consolidated and clarified" the prohibition on "abortion related activities under prior law." H. Conf. Rep. No. 97-208, 97th Cong., 1st Sess. (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 1010, 1178-79.

ligious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

2. Appellees Chan Kendrick, *et al.* (hereafter "plaintiffs-appellees"), filed this action on October 27, 1983, pursuant to 28 U.S.C. 1331, contending that the AFLA is unconstitutional in its entirety because it violates the Establishment Clause of the First Amendment. Appellees filed an amended complaint on December 29, 1983, challenging the constitutionality of only the care and prevention services (U.S. J.S. App. 5a).

Appellant United Families of America ("UFA") is an organization with members who are parents of minor children eligible for services provided under the AFLA. The district court's order diminishes the range, diversity, and effectiveness of programs available to UFA's members. Memorandum in Support of Motion to Intervene (filed Oct. 2, 1984). UFA intervened in the district court and participated as a defendant-intervenor in support of the constitutionality of the AFLA. See App. A, *infra* (order granting UFA's motion to intervene).⁵

Finding "that the material facts are not in dispute and that summary judgment is appropriate" (U.S. J.S.

⁵ Appellant's standing to intervene was based on the status of their members as beneficiaries and potential beneficiaries of the program. Cf. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 132-36 (1967) (users of natural gas had protectable interest justifying intervention of right in antitrust action by Justice Department against natural gas pipeline corporation, since they would be adversely affected by any outcome of the suit that tends to reduce competition); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (parents of public school children have requisite interest to intervene as of right as defendants-appellants in desegregation suit brought by other parents against the school board). See Memorandum in Support of Motion to Intervene (filed Oct. 2, 1984).

App. 7a-8a), the district court held that the AFLA was unconstitutional on its face and as applied “*insofar as it involves religious organizations in carrying out the purposes of the Act*” and declared that “*the involvement of religious organizations as AFLA grantees or subgrantees is unconstitutional*” (U.S. J.S. App. 2a, n.2 (emphasis in original)).

The court found that the AFLA had a secular purpose (U.S. J.S. App. 17a-22a) but held that the statute on its face has a primary effect of advancing religion because “of its use of religious organizations for educating and counseling of teenagers on matters relating to religious doctrine” (U.S. J.S. App. 22a, 27a). Because the purpose of the AFLA included counseling and educating “about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion,” and “these matters are fundamental elements of religious doctrine,” the district court concluded that the AFLA had a “direct and immediate” effect of advancing religion. *Id.* at 28a. “[B]y contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.” *Id.* at 30a.

Referring to several instances in which plaintiffs-appellees presented evidence that individual grantees had used curriculum with a religious derivation,⁶ provided spiritual counseling, or provided services on premises that display religious symbols, the court also held that the AFLA is unconstitutional as applied. *Id.* at 32a-38a. The court did not, however, make findings that any more

⁶ The district court noted that there was a factual dispute as to whether curriculum with “explicitly religious content” was taught in AFLA programs (U.S. J.S. App. 34a n.15). The court stated that there was no dispute that, in at least one instance, curriculum that was taught was “based on” religious materials. *Ibid.*

than a few of the grantees had been involved in these practices.

As a final basis for invalidation, the court held that the AFLA fostered an excessive entanglement between church and state. Because the religious organizations that were funded “have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement” (U.S. J.S. App. 40a).

The court declined, however, to determine whether any of the religious organizations that were grantees were “pervasively sectarian” under this Court’s definition,⁷ although the court did state that the record showed that “the AFLA has in fact . . . funded ‘pervasively sectarian’ institutions. . . .” (U.S. J.S. App. 33a). The court reasoned that “where the connection to religion is not apparent on the face of the statute or from the nature of the government act itself,” it was necessary to determine whether the organization was pervasively religious, but if the connection was clear on the face of the statute, then the court must only determine whether the statute “has the ‘direct and immediate’ effect of advancing religion” (U.S. J.S. App. 24a-25a).

After issuing the interlocutory order of April 15, 1987, the district court ordered further briefing on the issue of severability. On August 13, 1987, the court issued a final opinion and order, severing the term “religious organizations” from the AFLA and barring such organizations from participation in AFLA programs. The court stated that the “AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to ‘religious organizations.’” U.S. J.S. App. 54a. The court also declined to clarify what it

⁷ See, e.g., *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 & n.6 (1985); *Meek v. Pittenger*, 421 U.S. 349, 356 (1975); *Roemer v. Bd. of Public Works*, 426 U.S. 736, 755-59 (1976).

meant by the term "religious organizations," stating that there is "ample precedent in numerous statutes and federal regulations defining the term." *Id.* at 55a. The court also ordered the case dismissed from its docket. *Ibid.*

3. The Secretary has docketed two appeals in this case, one from the interlocutory order of April 15, 1987 (No. 87-253) and one from the final judgment (No. 87-431). Plaintiffs-appellees have docketed a conditional cross-appeal on the issue of severability (No. 87-462). On August 10, 1987, the Chief Justice granted the Secretary's motion for a stay pending appeal. 108 S. Ct. 1. On November 9, 1987, this Court noted probable jurisdiction in Nos. 87-431, 87-462.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is the first case since *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which this Court is asked to determine whether, and on what terms and conditions, religiously-affiliated organizations may participate in government-funded social welfare programs outside the area of elementary, secondary, and higher education. This case will affect hundreds of federal, state, and local programs in which religiously supported, inspired, or affiliated private groups are involved with the government in carrying out charitable social welfare activities.

The district court, disregarding *Bradfield* and the long-standing subsequent tradition of religious-governmental cooperation in the social welfare field, has adopted an extreme and unsettling construction of the Establishment Clause. According to the district court, governments may not involve religiously-affiliated organizations in any program that relates to their religious mission, even if the purpose of the program is entirely secular and the large majority of the participants are nonreligious. This holding cannot logically be confined to the relatively small AFLA program, since *every* field of social and charitable

work in which religious organizations are involved—from feeding the hungry and housing the homeless, to healing the sick and helping the alien—is understood by the religious organization as part of its religious mission.

Moreover, the district court has not confined its holding to organizations meeting this Court's definition of "pervasively sectarian," but has extended it to the wide range of voluntary organizations with a religious affiliation, inspiration, or connection, however slight. Nor did the court confine its holding to educational activities that might provide the occasion for religious indoctrination or instruction. Instead, it has ordered the exclusion of religious organizations from all aspects of the AFLA program, including pure "care services" indistinguishable from the many government-funded social welfare programs in which religious organizations now participate.

If not reversed, the district court's judgment thus threatens to disrupt the entire field of government-supported, privately-administered assistance for the poor, the sick, and the outcast. Moreover, the judgment is not required under this Court's interpretations of the Establishment Clause. On the contrary, the district court's holding would seriously reduce diversity and religious choice by forcing the secularization of all fields of charitable endeavor in which the government decides, for secular reasons, to supplement private efforts. The decision would also undermine the effectiveness of many programs by prohibiting the Secretary from making grants to the most qualified grantees, without regard to religious affiliation.

I. The Establishment Clause Permits The Involvement Of Religious-Affiliated Organizations, Along With Other Private Voluntary And Charitable Associations, In Government-Supported Social Welfare Programs.

When the government enters a field of social welfare activity, it has two basic options. It may set up a governmental agency, which will compete with and perhaps

supersede prior private efforts. Or it may provide resources through grants, contracts, and cooperative agreements, to promote and extend private efforts. The latter alternative has many advantages: it can be accomplished without creating a new bureaucracy; it can take advantage of volunteers and infrastructure already in place; it can use private expertise; it allows a far greater diversity in manner of execution; and it can build upon established relationships of trust among the beneficiary population. Accordingly, grants to private organizations have become a favored instrument for furthering governmental social welfare objectives.

Prominent among private charitable institutions are those with a religious affiliation. The question in this case is how the government may support private social welfare activities without violating the Establishment Clause of the First Amendment.

The Establishment Clause has been interpreted as enshrining the principle of neutrality—government action must have an effect that “neither advances nor inhibits religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In the context of governmental financial support for privately conducted social welfare activities, this command is subject to two conflicting interpretations, one followed by Congress and one adopted by the district court.

Congressional policy, reflected in the AFLA as well as countless other statutes, holds that grantees should be representative of the broad spectrum of private associations in the field. Significantly, this means that religious organizations may, and do, participate as grantees in a wide variety of publicly funded programs.⁸ As the Senate

⁸ See generally B. COUGHLIN, CHURCH AND STATE IN SOCIAL WELFARE (1965); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv.L.Rev. 513, 554-560 (1968); McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 420-24; Pickrell

Labor and Human Resources Committee stated in authorizing the AFLA:

Charitable organizations with religious affiliations historically have provided social services with the support of communities and without controversy.

S. Rep. No. 98-496, 98th Cong., 2d Sess. 10 (1984). These arrangements have been upheld by state and federal courts in a variety of contexts. See, e.g., *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Washington Health Care Facilities Authority v. Spellman*, 96 Wash. 2d 68, 633 P.2d 866 (1981); *Truitt v. Board of Public Works*, 243 Md. 375, 221 A.2d 370 (1966); *Craig v. Mercy Hospital—Street Memorial*, 209 Miss. 427, 45 So.2d 809 (1950); *Kentucky Building Comm. v. Effron*, 310 Ky. 355, 220 S.W.2d 836 (1949) (care for the sick); *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974) (three-judge court) (rejection of facial challenge), modified, 645 F. Supp. 1292, 1329-39 (1986) (settlement of as applied challenge); *Sargent v. Bd. of Education*, 177 N.Y. 317, 69 N.E. 722 (1904) (care for orphans); *Dunn v. Chicago Industrial School of Girls*, 280 Ill. 613, 117 N.E. 735

& Horwitz, “*Religion as an Engine of Civil Policy*”: *A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 Law & Contemp. Prob. 111, 113 n.16 (1981). Among the federal programs cited by these authors are: 29 U.S.C. 776(g) (1982) (rehabilitation for the handicapped); Hill-Burton Act of 1946, 42 U.S.C. 291 (1982) (hospital construction); 42 U.S.C. 622 (1982) (child welfare services); 42 U.S.C. 630-644 (1976) (Work Incentive Program); 42 U.S.C. 1397a (1976) (Title XX Social Security Act Day Care Services); 42 U.S.C. 2931-2932 (1982) (Head Start); P.L. No. 93-288, 88 Stat. 143 (1974) (disaster relief); P.L. No. 90-445, 82 Stat. 462 (1968) (juvenile delinquency); 42 U.S.C. 3027(a)(14)(A) (multi-purpose senior centers); P.L. No. 90-248, 81 Stat. 821 (1968) (maternal and child services); P.L. No. 87-70, 75 Stat. 149 (1961); P.L. No. 86-372, 73 Stat. 654 (1959) (housing); Economic Opportunity Act of 1949, P.L. No. 88-452, 78 Stat. 508 (1964), 42 U.S.C. 2781-2831 (1964); Peace Corp Act of 1961, P.L. No. 87-293, 78 Stat. 612 (1961); Agricultural Act of 1949, ch. 792, 63 Stat. 1051 (1949). Many more programs at the state and local level involve religious organizations.

(1917) (care for neglected or delinquent adolescents); *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967); *Richter v. Mayor & Alderman*, 160 Ga. 178, 127 S.E. 739 (1925) (care for the poor).

The AFLA follows this longstanding practice. In enacting the AFLA, Congress expressly found that issues of adolescent sexuality and pregnancy are "best approached through a variety of integrated and essential services provided . . . by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. 300z (a) (8) (B). Religious organizations are neither favored nor disfavored by the AFLA; they are merely included among the wide array of private and governmental organizations that may be involved in the program.

By including religious participants, Congress both procures the services of the best qualified grant applicants, without regard to religion, and gives families a broader range of choice in the style and philosophy of service agencies. As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that non-profit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16. The record shows that only 25% of the grantees in the AFLA program are religiously affiliated. Decl. of Jo Ann Gasper (May 12, 1987). This demonstrates that the program has not been administered in a way that favors religious over nonreligious participants.

The district court, on the other hand, held that religious organizations must be barred from publicly funded programs if those programs relate to their "religious mission" (U.S. J.S. App. 30a). The effect of this approach is to favor nonreligious organizations over religious, to create incentives for religiously-affiliated organizations to

drop their affiliations, and to deny beneficiaries of the program the option of receiving the services from providers affiliated with religion. Far from being neutral, this approach uses the fiscal muscle of the federal government to crowd out non-secular alternatives from all social welfare fields the government chooses to assist. To exclude an otherwise eligible organization from participation in a government program, merely because of its religious affiliation, raises serious constitutional questions under the Free Exercise and Equal Protection Clauses. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); cf. *McDaniel v. Paty*, 435 U.S. 618, 626-29 (1978).

This Court has never held that religious organizations must be excluded from publicly-supported social welfare programs. On the contrary, in the case most directly on point, *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court upheld a grant of \$30,000 by Congress to a hospital, even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. More recently, Justice Blackmun, writing for a plurality in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), stated the point succinctly. "It has long been established," he wrote, "that the State may send a cleric, indeed, even a clerical order, to perform a wholly secular task." *Id.* at 746. See also *Wolman v. Walter*, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part); *id.* at 266 (Stevens, J., concurring in part); *Lemon v. Kurtzman*, 403 U.S. at 644 (Douglas, J., concurring in part).

The key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983)

(Brennan, J., dissenting). See *Witters v. Department of Services*, 106 S. Ct. 748 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Roemer v. Board of Public Works*, 426 U.S. at 746; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970). Under the AFLA, grants are available to a wide array of groups, most of which are wholly secular. The effect of the program is neither to encourage nor discourage religious (as compared to nonreligious) efforts in this area, but simply to support a diverse group of service providers, of varying viewpoints and motivations.

For its contrary conclusion, the district court relied almost exclusively on cases involving aid to parochial schools. In these cases, the vast preponderance of aid goes (and is specifically tailored to go) to religious institutions. See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 782 n.38, 794 (1973); *Sloan v. Lemon*, 413 U.S. 825, 830 (1973); *Grand Rapids School District v. Ball*, 473 U.S. 373, 384 (1985); *Aguilar v. Felton*, 473 U.S. 402, 406 (1985).⁹ These cases are easily distinguishable from the instant case, where only a small part of the aid goes to religious organizations. Cf. *Witters*, 106 S. Ct. at 752; *Walz v. Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

The district court obliquely acknowledged the legitimacy of religious participation in social welfare programs in a footnote (U.S. J.S. App. 22a n.12), but purported to distinguish the AFLA on the ground that it is "related to religious doctrine" (*id.* at 27a). See *id.* at 30a:

It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful.

⁹ This point is perhaps clearest in *Mueller v. Allen*, 463 U.S. 388 (1983), where the crux of the dissenters' argument was that the tax benefits for educational expenditures would flow predominantly to sectarian schooling. *Id.* at 408-411 (Marshall, J., dissenting).

. . . The AFLA does not prohibit these religions from receiving AFLA grants. Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.

This argument proves too much. Virtually every activity conducted by religious organizations is related to their "religious mission" and grows out of a commitment to their "religious doctrine." There is nothing uniquely "religious" about issues of sex and pregnancy; the Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex. Religious organizations should not be barred from programs to feed and house the poor—or deal with the problem of adolescent pregnancy—merely because they advance religious objectives at the same time that they achieve the government's secular purposes.¹⁰

The district court correctly concluded that the purpose of the AFLA—to discourage teenage pregnancy, to promote adoption as an alternative to abortion, and to care for pregnant adolescents—is a legitimate secular objective. U.S. J.S. App. 17a-22a. That this may coincide, or harmonize, with the tenets of some religions is irrelevant

¹⁰ The district court's reasoning is the mirror image of the district court's reasoning reversed by this Court in *Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987). In *Amos*, the district court treated the social welfare activities of a church as too "secular" to warrant a free exercise legislative accommodation. Here, the district court has treated social welfare activities as too "religious" to receive support under the Establishment Clause. The better view is that social welfare activities of churches are "religious" for purposes of free exercise protection but "secular" for purposes of the Establishment Clause. Cf. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-6, at 828 (1978) (emphasis in original) ("[A]ll that is 'arguably religious' should be considered religious in a free exercise analysis. . . . [A]nything 'arguably non-religious' should not be considered religious in applying the establishment clause.")

for Establishment Clause purposes. *Harris v. McRae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). The district court's "religious mission" standard is tantamount to excluding all religious organizations from social welfare programs.

II. The District Court Erred In Excluding From Participation In The AFLA All Religiously-Affiliated Organizations, Including Organizations That Are Not "Pervasively Sectarian."

Even assuming arguendo that participation by some religiously-affiliated organizations in the AFLA is unconstitutional, the district court's order is overbroad, for it excludes not only organizations that are "pervasively sectarian," but all organizations with the slightest religious affiliation. This Court has carefully distinguished between "pervasively sectarian" organizations, in which religious and other activities are "inextricably intertwined" (*Lemon v. Kurtzman*, 403 U.S. at 657) and other religious organizations, which are "not 'so permeated by religion that the secular side cannot be separated from the sectarian.'" *Roemer v. Board of Public Works*, 426 U.S. at 759. Compare *Meek v. Pittenger*, 421 U.S. 349, 356 (1975), with *Roemer v. Board of Public Works*, 426 U.S. at 755-59; *Tilton v. Richardson*, 403 U.S. at 686-87. The description of the religious colleges in *Roemer*, for instance, demonstrates that an organization may have a substantial religious component to its activities without becoming "pervasively sectarian" under this Court's definition.¹¹

¹¹ The colleges in *Roemer* were formally affiliated with the Roman Catholic Church, with the Church officially represented on their governing boards; they employed Roman Catholic chaplains, held religious services, and "encourage[d] . . . spiritual development"; they required religion and theology courses for their students; they opened some—in one case a majority—of their classes with prayer; some of their classrooms contained religious symbols and some instructors wore clerical garb. 426 U.S. at 755-56. Nonetheless, the Court held that these colleges were not "pervasively sectarian" and could receive public aid.

The identification of "pervasively sectarian" institutions is of great practical importance under this Court's decisions. When a recipient of public aid is found to be "pervasively sectarian," the aid has been eliminated, for it is not possible to segregate religious from secular activities within the organization. On the other hand, organizations that are religious, but not "pervasively sectarian," are eligible for participation in publicly-funded programs on an equal basis with secular institutions, on the condition that they refrain from using the funds for "specifically religious activity." *Hunt v. McNair*, 413 U.S. 734, 745 (1973); *Roemer*, 426 U.S. at 759. Indeed, the Court will "assume that [such organizations] will exercise their delegated control over use of the funds in compliance with the . . . constitutional mandate." *Id.* at 760. This eliminates the need for excessively entangling surveillance of the organizations' use of the funds. *Id.* at 762.

In this case, the district court declined to determine which, if any, of the AFLA grantees are "pervasively sectarian."¹² Instead, the court defined as "religious" any organization with a religious affiliation, however tenuous. The court ordered the Secretary to exclude from the program any organization that has "explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine," as well as organizations, even "without discernable [sic] religious ties," that were "inspired" by religious writings or precepts. U.S. J.S. App. 35a. In its final order denying the government's Rule 59(e) motion, the court identified its use of the term "religious organization" with the "numerous statutes and federal regulations defining the term." *Id.* at 55a.

¹² Without explanation, the court did, however, assert that "the inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." U.S. J.S. App. 36a.

Among the grantees threatened with debarment under the district court's order are several religiously-affiliated hospitals, YWCA programs in various cities, Catholic Charities facilities, maternity homes, Emory University, Covenant House of New York, and several formally secular organizations, including Family of the Americas and Search Institute.

This broadly sweeping prohibition goes well beyond anything sanctioned by this Court. While there has been no opportunity for proof, it seems probable that many of the AFLA grantees that are cut off under the district court's order are not "pervasively sectarian" and should be retained in the program. If not reversed, this aspect of the district court's order will cause serious injury not just to the AFLA, but to many other social welfare programs.

III. The District Court Erred In Excluding Religiously-Affiliated Organizations From Providing Non-Educational Care Services Under The Act.

A wide variety of services are provided by grantees under the AFLA. Some projects are designed to rescue and rehabilitate adolescents who have been entrapped by drugs and prostitution;¹³ many more provide homes for unwed adolescent mothers with attendant medical and nutritional care;¹⁴ others provide pregnancy testing and related health services;¹⁵ others assist with adop-

¹³ See, e.g., Aff. of Rev. Bruce Ritter (Apr. 23, 1987) (Covenant House of New York).

¹⁴ See, e.g., Decl. of Jo Ann Gasper, Tab B (Oct. 21, 1985) (Salvation Army Maternity Home of Tulsa, Oklahoma); Def's Statement of Material Facts, Vol. I (St. Ann's Infant & Maternity Hospital of Maryland).

¹⁵ See, e.g., Def's Statement of Material Facts, Vol. IV (St. Paul-Ramsey Medical Center of Minnesota); Aff. of Carol A. Bervera (filed May 22, 1987) (Brightside for Children and Families, Our Lady of Providence Children's Center of West Springfield, Mass.).

tions.¹⁶ These services are not different in character from social welfare services provided routinely, without controversy, by religious and nonreligious grantees under other federal, state, and local programs. See pages 12-14 & n.8, *supra*.

The district court, however, failed to draw any distinction between the various services provided under the Act. Although the court's opinion discusses only projects involving sex education and counseling (U.S. J.S. App. 27a-32a), the order extends to the Act in its entirety. Even assuming arguendo that the district court is correct in its evaluation of the constitutionality of AFLA's sex education and counseling programs, the order cannot be supported as it applies to other health and welfare services. If not reversed, the district court's decision could create a precedent for exclusion of religious organizations from many activities in which they make a significant contribution to public welfare.

¹⁶ See, e.g., Def's Statement of Material Facts, Vol. I (Adoption Systems of WACAP, of Washington State).

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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November 10, 1987

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, *et al.*,
Plaintiffs,

v.

MARGARET HECKLER,
Defendant.

[Filed Nov. 26, 1984]

ORDER

Before the Court is the motion of Sammie J. Bradley, Katherine R. Warner and the United Families of America ("UFA"), to intervene in this action under Fed. R. Civ. P. 24(a) or 24(b). Upon consideration of this motion, as well as the memoranda in support thereof and in opposition thereto, the Court hereby allows the movants to intervene under the permissive intervention provision of Fed. R. Civ. P. 24(b).

Initially, the Court find the application to be timely filed. As this Circuit has consistently held, "[w]hether a motion to intervene is timely made is 'to be determined from all the circumstances, including the purpose for which the intervention is sought . . . and the improbability of prejudice to those already in the case.'" *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981), citing, *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). In this case, based upon the representation of counsel for the movants that the intervenors will conduct no additional discovery and will

abide by the briefing schedule as it pertains to the defendants, there will be no prejudice to either side. Plaintiff's argument that intervention will result in delay due to the potential for two cross-examinations of each witness is without merit. If this were a ground to deny intervention, then all intervenor motions would be unsuccessful.

Second, the Court finds that the intervenors raise common questions of law and fact with the present case. The intervenors seek to have the Adolescent Family Life Act ("AFLA") programs upheld because these programs present an alternative to Title X which the intervenors find to be more in keeping with the tenets of their religious beliefs. Therefore, it is at least arguable that they have an interest in the outcome of this litigation, and in the constitutionality of the AFLA programs.

Third, the Court's ability to allow a permissive intervention is wholly discretionary once the two requirements above have been satisfied. *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972). The Court, in the exercise of this discretion, feels that the issues raised by the intervenor are related to this action and ought to be heard.

Therefore, it is by the Court this 21 day of November, 1984, hereby

ORDERED that the motion to intervene be granted, based on the representations of intervenors' counsel that there will be no further discovery and that the intervenors will respond to plaintiffs' motion for summary judgment no later than November 27, 1984 and file their own dispositive motion no later than December 3, 1984.

/s/ Charles R. Richey
CHARLES R. RICHEY
 United States District Judge

APPENDIX B**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 83-3175

CHAN KENDRICK, *et al.*,
Plaintiffs,
 v.

DR. OTIS R. BOWEN, JR., Secretary of the
 Department of Health and Human Services,
Defendant,
 and

SAMMIE J. BRADLEY, KATHERINE K. WARNER and
 UNITED FAMILIES OF AMERICA,
Defendant-Intervenors.

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given this 11th day of September, 1987, that Defendant-Intervenor, UNITED FAMILIES OF AMERICA, hereby appeals to the Supreme Court of the United States from the final order of the District Court entered August 13, 1987 in this action in favor of Plaintiffs.

This appeal is taken pursuant to 28 U.S.C. Sec. 1252.

Respectfully submitted,

/s/ Michael W. McConnell
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 Chicago, IL 60637
 (312) 702-3306

(2) Supreme Court, U.S.
FILED

DEC 10 1987

No. 87-775

JOSEPH E. BRYAN, JR.
CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-775

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

***ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA***

MEMORANDUM FOR THE UNITED STATES

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

Appellant challenges the district court's judgment declaring unconstitutional the references to "religious organizations" in the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, and enjoining the Secretary from enforcing the statute "as it pertains to 'religious organizations'" (87-431 J.S. App. 47a-49a). The Court has previously noted probable jurisdiction in the Secretary's challenge to the same judgment (Nos. 87-253 and 87-431), as well as in a cross-appeal (No. 87-462) that challenges the further judgment of the district court holding that the references to "religious organizations" may be severed from the constitutional remainder of the Act.

We believe that the present appeal raises substantial questions that should be considered in connection with the appeal and cross-appeal currently before the Court. We therefore agree that probable jurisdiction should be noted in No. 87-775 and that the case should be consolidated with Nos. 87-253, 87-431 and 87-462. We have been informed

by counsel for appellant in No. 87-775 that he is prepared to abide by the briefing schedule that has been approved by the Clerk in the other cases.*

It is therefore respectfully submitted that probable jurisdiction should be noted in No. 87-775 and the case consolidated with the appeal and cross-appeal in Nos. 87-253, 87-431 and 87-462.

CHARLES FRIED
Solicitor General

DECEMBER 1987

* By letter of November 20, 1987, with the consent of the Kendrick parties, the Solicitor General proposed that the Secretary's opening brief be filed on January 7, 1988; the Kendrick parties' response and opening brief be filed on February 13, 1988; the Secretary's reply and responsive brief be filed on February 23, 1988; and the Kendrick parties' final reply be filed on March 4, 1988. This schedule was subsequently approved by a November 24, 1987 letter of the Clerk. Appellant in No. 87-775 would adhere to the filing dates assigned to the Secretary.

DEC 16 1987

JOSEPH E. SPANOL, JR.
CLERK

No. 87-775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA,

Appellant,

—vs.—

CHAN KENDRICK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEE KENDRICK

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA,

Appellant,

—vs.—

CHAN KENDRICK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEE KENDRICK

This case involves a challenge to the Adolescent Family Life Act ("AFLA"), Title XX of the Public Health Services Act, 42 U.S.C. §§ 300 *et seq.* The district court below held in an opinion dated April 15, 1987, that the provisions of the AFLA violate the Establishment Clause of the First Amendment. In an opinion dated August 13, 1987 the district court held that the unconstitutional provisions were severable from the remainder of the Act. The Secretary of the Department of Health and Human Services, defendant below, appealed the district court's decision, and appellees cross-appealed on the question of severability. On November 9, 1987, this Court noted probable jurisdiction for each appeal, (docket nos. 87-253, 87-431, and 87-462) and consolidated the cases.

Appellant United Families of America ("UFA") intervened in the case below on behalf of the defendant and on November 10, 1987 appealed the district court's final determination that the AFLA was unconstitutional. Because this Court has

already agreed to hear the government's identical appeal of the district court's decision, appellees do not oppose this Court noting probable jurisdiction over UFA's appeal. Because UFA's appeal raises related issues raised by the government's appeal, appellees respectfully move this Court to consolidate the appeals upon noting probable jurisdiction in this docket.

Respectfully submitted,

/s/ JANET BENSHOOF

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Dated: December 15, 1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Argued by JAMES P. SPANOS, Esq.

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

CHAN KENDRICK, et al.,

Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,

Cross-Appellee.

UNITED FAMILIES OF AMERICA,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' AND CROSS-APPELLANTS' BRIEF

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QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, which requires religious involvement in all programs, and which funds religious organizations to teach and counsel on sexuality issues, violates the Establishment Clause of the First Amendment.
2. Whether the district court erred in severing the statutory provisions that involve religious organizations in Adolescent Family Life Act programs, and in enjoining the funding of religious organizations, rather than invalidating the Adolescent Family Life Act in its entirety.

PARTIES

Defendant below, Otis R. Bowen, in his official capacity as Secretary of Health and Human Services, is Appellant herein. Defendant-Intervenors in the trial court were Sammie J. Bradley, Katherine R. Warner and United Families of America; United Families of America is Appellant-Intervenor herein. Plaintiffs below, Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shizley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress are Appellees herein.

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INTRODUCTION

The Adolescent Family Life Act is without question a law respecting an establishment of religion. In enacting the Adolescent Family Life Act ("AFLA"), Title XX of the Public Health Service Act, 42 U.S.C. §§ 300z to 300z-10, Congress deliberately chose to fund religious instruction on sexuality. Religious organizations are called upon to participate in AFLA programs in their traditional role as transmitters of religious values. Pursuant to the Act, AFLA programs convey to young people a message—as one enthusiastic recipient of AFLA services explained it—that "the focus of sexuality [is] shifted to the total person in Christ" and that students are to "travel life's highway with God, as their copilot!" J.A. 427.

The AFLA is both intended and perceived to convey a message of government endorsement of religion and certain religious beliefs. The AFLA endorses religion by 1) requiring the involvement of religious organizations in all funded programs; 2) funding religious organizations to provide sex education and reproductive health care services in a manner that promotes theological beliefs; 3) funding only those religious groups that hold certain theological beliefs about sexuality issues, including abortion; and 4) funding programs likely to promote religion with no statutory assurances that the funds will be used for purely secular purposes.

The district court's judgment of unconstitutionality¹ rests on the overwhelming showing made by plaintiffs, rebutted by neither the government nor intervenors, that, in enacting the AFLA, Congress undertook to fund a religious crusade against adolescent "promiscuity" and abortion.² The court's opinion in no way threatens, as the government and intervenor contend, the ability of religious organizations to operate non-

¹ All citations to the district court's opinion will be to the Appendix of appellant's Jurisdictional Statement in the form "J.S. App. ____." Cites to the Joint Appendix are in the form "J.A. ____." Cites to other parts of the record are by the record number, in the form "R. ____." "R. 155, A., ____, ____" refers to a volume of the Appendix to plaintiffs' Statement of Material Facts.

² The original draft AFLA bill spoke in terms of discouraging "adolescent promiscuity" and promoting "chastity." S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981).

ideological and non-sectarian programs at government expense under properly limited statutes respectful of the Constitution.

Notwithstanding the elaborate and novel legal arguments made by appellants, this case requires the Court only to say what should have been too plain for argument—that under our Constitution religious instruction and indoctrination are not within the scope of Congress' power to tax and spend for the general welfare.

STATEMENT OF THE CASE

A. THE LEGISLATION

Congress passed the Adolescent Family Life Act to replace the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 ("Title VI"). *See* S. Rep. No. 161, 97th Cong., 1st Sess. 1 (1981) ("Senate Rep."). The AFLA's sponsors were unhappy with the lack of "values"-teaching in Title VI programs and remedied this by "*promoting* the involvement of religious organizations." *See* Senate Rep. at 7, 15-16 (emphasis added). Congress specifically included religious groups in order to inject religious values and the power of religion into AFLA programs. Congress recognized that religion could do what government could not, because religion does not suffer from "the limitations of Government in dealing with a problem that has complex moral and social dimensions." *Id.* at 15-16. Moreover, this government funding of religion was intended to be highly visible; the AFLA is a demonstration project designed to create models for other programs to follow, and it is to be "*promoted and publicized.*" *Id.* at 16.

The AFLA, in contrast to Title VI,³ requires the involvement of religious organizations in funded programs,⁴ either as direct recipients of federal funds and/or in cooperation with secular grantees, and inserts the words "religious and charitable organizations" in four separate places. §§ 300z(a)(8)(A), (B);

³ The AFLA is attached hereto as Appendix A; its predecessor statute "Title VI" is attached hereto as Appendix B.

⁴ Appellants have pointed to no other federal statute that expressly *requires* the involvement of religious organizations as such in its funded programs.

300z(a)(10)(C); 300z-2(a); 300z-5(a)(21)(B).⁵ For example, section 601(a)(5) of Title VI stated "the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services." 92 Stat. 3595. The corresponding section of the AFLA states "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and . . . are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, *religious* and charitable organizations, voluntary associations, and other groups" § 300z(a)(8)(A) to (B) (emphasis added).⁶

The AFLA includes two grant requirements not present in Title VI that mandate religious involvement in *all* AFLA programs. First, "[d]emonstration projects shall . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." § 300z-2(a) (emphasis added). Second, every application for AFLA funds must include "a description of how the applicant will, as appropriate in the provision of services, involve *religious* and charitable organizations, voluntary associations, and other groups. . . ." § 300z-5(a)(21)(B) (emphasis added).⁷ Moreover, unlike other federal statutes contemplating aid to religious institutions, the AFLA contains no provision to ensure that funds will be used only for secular purposes.

⁵ As the district court found: "The legislative history of these provisions shows without doubt that Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations." J.S. App. 28a. Moreover, the court recognized that "Title VI was amended to permit religious organizations to be involved in AFLA programs." J.S. App. 22a.

⁶ The AFLA also includes a new provision stating that government services under the Act "should emphasize the provision of support by other family members, *religious* and charitable organizations, voluntary associations, and other groups . . ." § 300z(a)(10)(C) (emphasis added). Compare Title VI, § 601(a)(7), 92 Stat. 3595.

⁷ The "as appropriate" language was not intended to make involvement of religious groups optional; grantees do not have a choice about whether to involve religious organizations. Rather, it affords discretion to grantees to decide *how* to use religious guidance. This section was interpreted as being a mandatory grant requirement both by the district court, J.S. App.

The AFLA also differs from Title VI by making instruction and indoctrination of certain values concerning sexuality a major component of the Act. § 300z-1(a)(8).⁸ Seven of the seventeen listed AFLA care and prevention services explicitly involve education and counseling, and two involve activities intimately related to education and counseling—outreach and planning services. J.S. App. 5a. In fact, with the exception of pregnancy testing, child care and transportation services, all of the AFLA care and prevention services involve some form of teaching, referral, or counseling services. See § 300z-1(a)(4).

Finally, the AFLA seeks “to encourage adolescents to bring their babies to term,” Senate Rep. at 20, and to promote adoption, while discouraging abortion. The AFLA imposes the following abortion restriction on all grantees:

Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

§ 300z-10(a) (emphasis added).⁹

40a, and by Congress in its 1984 reauthorization of the AFLA, see S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984).

8 Under Title VI there was no separate funding for “prevention services,” which under the AFLA include educational programs “to prevent adolescent sexual relations,” § 300z-1(a)(8) and the Title VI programs contained no content restrictions.

9 Contrary to the district court’s interpretation, J.S. App. 14a-15a, the legislative history of the abortion prohibition makes clear that Congress intended both to restrict abortion speech in AFLA programs and to impose eligibility restrictions on organizations that can be construed as “promoting” abortion even with private funds. See Senate Rep. at 20; S. 1090, 97th Cong., 1st Sess. § 1911 (June 24, 1981) (R. 185, Supp. A., 124-25) (draft preceding one adopted); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 816-17 (1981), reprinted in 1981 U.S. Code Cong. & Admin. News 1010, 1178-79. In

B. THIS LAWSUIT

This action seeking declaratory and injunctive relief was filed on October 26, 1983 in the United States District Court for the District of Columbia, challenging the constitutionality of the AFLA on the grounds that it violated the religion clauses of the Constitution. Plaintiffs include federal taxpayers, four Protestant ministers and the American Jewish Congress.¹⁰

Plaintiffs do not disagree with the government’s description of the proceedings in this case. The government, however, mischaracterizes the district court’s opinion on the cross motions for summary judgment, so it is necessary to restate briefly its holdings.

The district court applied the now well-settled three-part test for Establishment Clause violations. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court found that the AFLA has a valid secular purpose¹¹ and thus satisfied the first *Lemon* prong. The court held that the AFLA failed the second, “primary effect,” prong of the *Lemon* test because its use of religious organizations for indoctrination was clear from the face of the Act, and the AFLA has “the direct and immediate effect of advancing religion.” J.S. App. 23a (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S.

contrast to the AFLA restrictions, Title VI required counseling and referrals on all pregnancy options, including abortion. § 601(a)(22), 92 Stat. 3600. Finally, the AFLA added the requirement of parental notification and consent for minors requesting specified services, except if it is believed that the parents are attempting to compel the minor to have an abortion. § 300z-5(22).

10 The religious plaintiffs alleged injury not only as taxpayers but also to their religious ministries: Because of their denominations’ theological positions on abortion, they are not eligible for AFLA grants, yet religious organizations with beliefs antithetical to theirs receive AFLA funds which enable them to promote their beliefs. The American Jewish Congress sued on behalf of its members. R. 6.

11 In so holding, however, the court noted that under prior precedent, a statute satisfies the purpose prong as long as it has “some” valid secular purpose, “[e]ven when the benefits to religion are substantial, and motivation to advance or benefit religion is apparent.” J.S. App. 17a. The court emphasized three times that although the AFLA met this test, it did so because it was not “motivated wholly by religious considerations.” J.S. App. 20a, 21a, 22a (emphasis in original).

756, 783 n.39 (1973)). The court buttressed this conclusion by applying three factors referred to by this Court as independent indicia of "primary effect," see J.S. App. 25a-27a, and found that the AFLA failed each one of these tests.

First, by involving religious organizations in the value-laden enterprise of discouraging premarital sex and abortion, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 30a. Second, "the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed." *Id.* at 30a-31a. Finally, "the involvement of religious organizations in counseling and education on premarital sex, abstinence, and the preferability of adoption to abortion creates a 'crucial symbolic link' between government and religion when the counseling is funded by the public fisc." *Id.* at 31a. The court reached "the inescapable conclusion . . . that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a.

The court held that the AFLA fosters excessive entanglement due to the sectarian character and purpose of the religious grantees, *id.* at 40a, the "great" potential that AFLA-funded religious organizations would further religion when counseling teenagers, *id.* at 41a, and the fact that ensuring that religion is not promoted "would require extensive and continuous monitoring and direct oversight of every counseling session." *Id.* The court concluded that "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." *Id.* at 42a.¹²

C. FACTS

1. Introduction.

The district court relied on the "undisputed record" which "transform[ed] the inherent conflicts between the AFLA and

¹² The court also found that the AFLA is likely to incite political division along religious lines because it addresses issues that are of fundamental importance to religions and about which religions disagree along denominational lines. J.S. App. 43a.

the Constitution into reality." J.S. App. 32a, 38a.¹³ The court "carefully and exhaustively" considered "the golconda of documents submitted," *id.* at 7a, which "reveal[ed] the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, and permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion." *Id.* at 33a.

2. HHS Interpreted The Statute To Require Religious Involvement By All Grantees.

a. Fulfilling The AFLA's Purpose, HHS Injected Religious Bias Into The Grant-Making Process.

In 1982, the first AFLA grant cycle, Marjorie Mecklenburg, the Director of the Office of Adolescent Pregnancy Programs ("OAPP"), selected external field readers to evaluate 405 applications. R. 107, Ex. 7. The director of program development and monitoring for OAPP, Patrick Sheeran, who had extensive experience supervising adolescent grant programs, R. 55, 10-30, testified that he was surprised by the readers who were selected solely by Mecklenburg, both by their lack of

¹³ The court's reliance on plaintiff's facts was based on the thoroughness of their papers and defendant's admissions:

[Plaintiffs'] "Statement of Undisputed Material Facts" . . . quoted extensively from the exceptionally large record in this case and cited to the exact place in the record where each quotation could be found. . . . Most of defendant's "disputes" of plaintiffs' facts were unsupported disagreements, complaints that a quote had been taken out of context, or the word "dispute" with a reference to the page in the multi-volume record at which the Court could look up an undescribed disagreement and decide for itself whether the effort was worthwhile. Defendant also "controverts" some of plaintiffs' facts with "declarations to be supplied later." The Court knows of no such later-filed declarations . . . [S]uch a "response" does not comport with the command of Local Rule 108-h . . . [The Court] regards as "disputed" all facts pointed to by plaintiff and disputed on the basis of identified evidence in the record that actually makes the point claimed by defendant. As Rule 108-h requires, the Court takes as uncontested all other facts pointed to by plaintiffs.

J.S. App. 32a n.14. Of the 1251 facts submitted by the plaintiffs, 1215 or 97.8% of these were uncontested. J.A. 619-23.

experience and by the high proportion with religious affiliation (30 or 40 percent).¹⁴ J.A. 98.

The readers' evaluations make clear that they understood that the legislation was intended to *require* religious indoctrination to achieve the legislated goals and to that end requires the involvement of religious organizations.¹⁵ OAPP summaries of the evaluations sent to rejected applicants indicate that the requirement of religious involvement was so central to the Act that the absence of evidence of such involvement was a basis for rejection.¹⁶

14 Intervenor's claim that government officials selected grantees without regard to religious affiliation and ranked them by objective criteria is unsupported. Int. Br. 28. See *infra* pp. 31, 51 & n.107, 52.

15 Readers commented that: "the involvement of religious organizations suggests an understanding of the purpose of the demo. program." R. 155, A., I, 345 (Crow Wing County Board of Health). "I fail to see any involvement of clergy and religious leaders. . . ." R. 111, 333 (Cooperative Education Service Agency). "There is missing a decided pro-life commitment in this proposal . . . Lacking is the kind of counseling that you get in Catholic Social Service for example." J.A. 509 (Baltimore City). "A major weakness in the prevention aspect is no board of community ministerial (psycho-spiritual) value experts are involved as a major hand in values curriculum development or teaching." R. 155, A., I, 342 (emphasis in original) (Department of Health and Human Services, New Orleans). One reader scored an application low because: "No experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." A consultant hired by OAPP to evaluate the grant making process asked Ernest Peterson, "What would happen if the ACLU got hold of that comment?" J.A. 511. Comments also included: "The . . . unique aspect of this approach . . . is predicated on the idea that teen pregnancy occurs because teens lack, among other things, spiritual and cultural values . . ." R. 155, A., I, 355 (University of Pittsburgh School of Social Work). Under "Strengths" reviewers wrote: "Involvement of religious/charitable organizations clearly indicated." *Id.* at 329 (Rutgers State University/Regl. Health Programs). "The pastoral training is very, very good involving the religious. . . ." *Id.* at 354 (Kankakeeland Community Action Program).

16 Rejected applicants were told that they had not received funding because: their programs promised "no involvement of religious groups," R. 155, A., I-A, 505D (Lake Cumberland District Health Department); "[t]here is no evidence that local churches or pastoral help and training will be used," *id.* at 505E (Junior Education of Tomorrow); "[t]here was no discussion of the development of moral or spiritual values as a part of the program," *id.* at 505G (San Diego University Foundation); "[d]escriptions of relationships with community and religious organizations should have been expanded," *id.*

b. HHS Funding Decisions Ensured That Religions And Religious Viewpoints Would Be Advanced.

In 1982, out of fifty-nine "care," "prevention" or "combination" grants, nine primary grantees were religiously affiliated organizations, all with Christian theologies. J.A. 683-85, 689, 748-54; R. 155, A., IV, 158, 160.¹⁷ In 1983 all nine were re-funded and two religious organizations were added, Families of the Americas Foundation, Inc. ("FAF") and Search Institute. J.A. 748-54; *see also* J.S. App. 34a-36a.¹⁸

It was clear from the face of the grant proposals that AFLA grants for 1982 and 1983—and 1987¹⁹—would be used to fund religious organizations, provide religious materials in order to

at 505K (University of Pittsburgh School of Medicine); "[t]his appears to be the same type of prevention program that has been advocated and practiced by Planned Parenthood for many years. . . . We need . . . those who advocate a more spiritual and moral approach to these teenagers," R. 155, A., I, 340 (Arkansas Coordinated Child Effort); "[n]o evidence of use of local family-values experts such as pastors or Christian ed. directors in local churches where teaching could be ongoing," *id.* at 346 (Texas Agricultural Extension Service). *See also* R. 155, A., I-A, 505B, 505F, 505I, 505J.

17 Seven were Catholic, one Church of the Latter Day Saints, and one Missouri-Synod Lutheran. J.A. 689.

18 The district court found that "at least ten AFLA grantees or subgrantees were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." J.S. App. 34a-35a (emphasis added). Using FAF as an example, the court also stated "[t]he religious character of other AFLA grantees or subgrantees is not as explicit but is nonetheless indisputable." *Id.* at 35a.

19 Because of the five year cap on grant awards, § 300z-4(c)(1), the 1987 grantees are not the same as those subject to discovery in this case. However, information from this record alone reveals the likely religious nature of at least two current grantees. One 1987 grantee, the Archdiocese of Washington, also applied in 1982. A reader's comment at that time was: "The program objectives and benefits are to teach positive sex education along with Christian values of life and family, and to include parents/adults in this catechetical approach. . . ." R. 155, A., I, 320 F.

Materials with explicit religious references from another 1987 grantee, Community of Caring, were included with 1982-1986 grantee Catholic Family Services of Amarillo. *See* R. 155, A., IV, 90-101; *see also* R. 181, Watson Decl. ¶ 22A.

promote religious viewpoints, build AFLA programs on existing religious programs, and provide programs in churches and parochial schools. The district court found that the "programs in operation" did not solve "the First Amendment problems evident from these approved grant applications." J.S. App. at 36a.

i. OAPP Funded Secular Grantees To Use Religious Means To Achieve AFLA Goals.

Secular grantees under the AFLA envisioned their role as helping churches to promote more effectively their religious tenets on sexuality. The grant application for the Southeast Missouri Association of Public Health Administrators, Inc. ("SeMo") states:

One of the most obvious tools which can be used to change the attitude of young people toward sexual activity . . . is the use of the religious foundation as a support for sexuality education. Most major religions see sexuality as being of God and can therefore . . . help young people to learn about their bodies and the values that relate to sexual functioning in a context that is consistent with the tenants [sic] of their particular faith.

J.A. 562. SeMo was funded to aid churches "in achieving *their* stated goals," R. 155, A., IV, 131-32 (emphasis in original), and to help "families and churches to communicate [their] values more effectively."²⁰ *Id.* at 134. Further, SeMo felt its "success in delivering sexuality education through fundamentalist churches, if continued, could result in [its] becoming a model program for this type of delivery mechanism." *Id.* at 141.²¹

²⁰ In its 1983 continuation application, SeMo predicted a "substantial increase in the level of participation by church and religious organizations . . . primarily from the fundamentalist religions." R. 155 A., IV, 156. From January 1 through September 30, 1983, 43% of the people receiving informational presentations did so through groups with a religious affiliation. *id.* at 151.

²¹ SeMo's director sent OAPP a speech about SeMo's work, stating that "the church can do your job better, cheaper and with more continuity. . . . In our program we contact churches through individuals

In keeping with the statutory commands, secular grantees used religious institutions as vehicles to promote the AFLA's goals. For example, the Charles Henderson Child Health Center's ("CHCHC") prevention program was based on the view that "there [is] only one mechanism through which the families may become a part of our effort, *that being the church,*" J.A. 577 (emphasis in original), and explained that its program would "never contradict [that] which is taught at home or in church, but it should act as a support for these institutions . . ." R. 155, A., IV, 404. CHCHC used its AFLA funds to promote "Family Week" culminating in "Family Sunday" which encouraged pastors to promote Christian views on the family and "commitment to their moral standards." *Id.* at 403.²²

Memorial General Hospital Association in West Virginia was funded for a program which included plans to contact religious groups and seek input from the local religious community so as to support the development of teenagers' "own [religious] values." *Id.* at 291. After being funded it reported:

Our contacts with the local religious community enables us to support our clients in the development of their own values and, if appropriate, to cooperate with these groups or members of the clergy. One YHS [Youth Health Services] staff member has even served as a co-therapist with an area minister. We will continue to involve religiously oriented groups and individuals in our programs at YHS.

*Id.*²³ A standard workshop session utilized a minister-leader and was designed to answer questions such as: "what are our

. . . and let them do the selling."

²² OAPP officer Barbara Rosengard was aware that as part of the AFLA programs CHCHC arranged for family day with "sermons in various churches." R. 74, 126.

²³ Workshops were conducted in church facilities for both students and "Christian Education Teachers." R. 155, A., IV, 294-98. Another program, the Guidance Center, put on family life education classes in conjunction with religious leaders. Two classes were held in religious schools in the classrooms for the school children. Sessions with ministers were held to encourage their support for and involvement with AFLA programs for their congregations. *Id.* at 413-14.

values as *Christians*," and "what values are presented in the Ten Commandments." *Id.* at 292 (emphasis added). Many other secular grantees promoted religion, aided religious institutions or combined forces with sectarian groups to further sectarian goals.²⁴

ii. AFLA Programs With A Distinctly Religious Slant Were Presented To Public School Students.

The School of Public Health of the University of South Carolina, sponsored a public high school play submitted to OAPP in which the script calls for student actors to assert that "*the Church* never has, does not now, and will never approve of abortion." *Id.* at 424, 425, 430 (emphasis added). The peer counselors who wrote the play and the students who saw it were taught that "*the Church*" is a monolithic structure with one view of abortion.

Search Institute's grant to promote a sex education curriculum in public schools and churches, *id.* at 16, was designed with "an emphasis on family, *church* and community involve-

24 The Maternal and Child Health Program in Hawaii was funded to provide "church and counseling based efforts at reaching families," plan "seminars for professional church staff and church volunteers" and encourage churches "to offer their unique lesson materials on teen sexuality and family involvement." J.A. 579 (emphasis added). Lyon County Health Department's grant proposal noted that "[s]uch sensitive and intimate [sex education] material *cannot* be presented without touching on . . . religious beliefs." R. 155, A., IV, 221. Lyon County held classes at several churches and parochial schools. *Id.* at 230, 238. Tucson Unified School District No. 1 described how subcontractee St. Elizabeth's would distribute a film to "help[] boys and girls understand their roles and live their lives as Christians." *Id.* at 289. Community Health Clinics in Nampa, Idaho applied for a grant to expand an existing program which one minister's support letter noted would "help motivate and facilitate [the churches] in doing what we need to be doing." *Id.* at 329. Hill Health Corporation organized a network including two churches and a Catholic social services agency to provide a "homeostatic balance by which parents and their children grow and interact, learning from each other, in a manner that is culturally and socially acceptable to the community, i.e., *the church*, the schools and other institutions the family comes in contact with." *Id.* at 392-94 (emphasis added). Hill Health makes religious practices one of the measures of family togetherness: "poor family togetherness" is indicated where "religious practices are absent." *Id.* at 397.

ment," *id.* at 17, (emphasis added), and was to "build on the work Rev. John Forliti of the Search Institute staff has done in developing a value-based sex education model for the Roman Catholic Church[,] [t]itled 'Reverence for Life and Family: A Catechesis in Sexuality.' " J.A. 433; J.A. 115²⁵ (emphasis added). OAPP staff knew that this program was used by Archdioceses, parishes and Catholic schools and admitted that a class using this manual could discriminate against Jews. J.A. 115-16; R. 125, 54, 122-25.²⁶

iii. OAPP Funded Grantees To Build Upon Existing Religious Programs.

Some grantees had pre-existing religious programs. St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, R. 155, A., III-A, 512, subcontracted with the "Center For Life" at Providence Hospital. The Center was chosen to provide the mandatory educational component because it would do so in accordance with the teachings of the Catholic Church. J.A. 286-87; R. 155, A., III-A, 512, 516. The Center's AFLA program, "Pathways," consists of classes for pregnant teens in fertility awareness,

25 The brochure for the book explains that it has as its goal "training in chastity in accord with the teaching of Christ and the Church." R. 155, A., IV, 31. Rev. Forliti, who applied as the proposed AFLA project director, *id.* at 14, 23, wrote the program as part of his responsibilities as Director of Religious Education for the Archdiocese of St. Paul. R. 125, 53.

26 Brigham Young University ("BYU") was funded for development of a public school sex education curriculum which had as the project director a former Bishop of the Mormon Church and a current faculty member in the family life department at BYU. Religion courses are required at BYU, faculty members are required to adhere to the principles of the Mormon Church, and the expressed philosophy about education is one that combines secular and religious teachings: "It has always been the view of The Church of Jesus Christ of Latter-Day Saints that education is not complete without proper integration of secular and religious knowledge and values. Understanding and skill are important attainments in life and will better serve the individual when accompanied by religious convictions, attitudes and standards of behavior." R. 155, A., VI, 202-03; see also J.A. 616-17.

contraception,²⁷ intimacy²⁸ and natural family planning. Pathways was taught by the same employees, using the same religious materials,²⁹ as the pre-existing and still continuing "Rainbow" program developed by the Center for Catholic schools.³⁰ Girls at grantee St. Ann's are instructed on the "Christian tradition" of marriage. J.A. 344. That St. Ann's provides religious instruction is not surprising because it "functions according to Christian principles as taught by the Catholic Church." R. 93, Ex. 2; see also J.A. 314-15.³¹

27 The original grant application stated that the family life component would "present information both on the advantages and the medical hazards of common contraceptive methods." However, St. Ann's submitted a revised version to HHS stating it would only "present information on the medical hazards of common contraception methods." J.A. 294-96, because the assistant administrator of St. Ann's wanted the grant proposal to reflect more "accurately" the thrust of the classes. J.A. 316-17; see also J.A. 288-91. Biased information on contraception consistent with the church's teachings was in fact presented. J.A. 299-300, 337, 350-53, 360-61, 363-64.

28 The "spiritual" facets of intimacy include "meaning of life for both partners, relationship to universe and God." R. 59, Ex. 4, at 5.

29 At St. Ann's, books that contain Catholic doctrine on chastity, masturbation, homosexuality and abortion, bought and paid for by the AFLA, were distributed to participants. See J.A. 336, 354-59, 362. After discovery in the lawsuit, HHS wrote St. Ann's and asked that two religious books, McGahey, *Sex, Love and the Believing Girl* and Knight, *The Good News About Sex*, not be used. J.A. 674. HHS, however, made no effort to prevent St. Ann's from distributing the other religious books that were used in the program, including McGahey, *Sex, Love, and the Believing Boy*, R. 59, Ex. 20, and Espinosa, *Birth Control, Why Are They Lying to Women?*, which states, for example: "The gentleness with which we should approach human life has transcendental roots: 'To me you shall be sacred; for I the Lord am sacred.' (Lev. 20:26). To work in the pro-life movement you should, in a way, 'Take off your shoes, because the ground on which you are walking is holy.' (Ex. 3:5)" J.A. 365.

30 The Rainbow brochure states it "provides . . . a more Christian, pro-life education in sexuality than that available in the public sector." J.A. 370.

31 St. Ann's progress report stated: "Our philosophical orientation is that sexuality [is] a God-given gift to be used with reverence. . . ." J.A. 376. It mentions God two additional times and ends by asking: "How is the work we are doing in this project different because we believe in Jesus Christ?" J.A. 377.

Families of the Americas Foundation ("FAF"), formerly World Organization Ovulation Method-Billings ("WOOMB"), U.S.A. is a Catholic organization whose "broad purpose" is to "disseminat[e] accurate information about the Billings Ovulation Method," ("BOM") a method of natural family planning.³² FAF viewed the AFLA as an opportunity to expand its existing Christian sexuality program "based on the teachings of the Catholic Church;" its application proposes goals identical to that of the existing program. J.A. 379-80, 387, 390. The application makes clear that BOM "[i]s not only a method of birth regulation but also a philosophy of pro-creation . . . , and OAPP staff members were aware that this meant teaching a religious philosophy. J.A. 141-43. One of the funded grant activities entailed "providing continuous communication on all of our national and international activities with the newly founded 'Pontifical Council for the Family' at the Vatican." J.A. 168.

Catholic Charities of the Diocese of Arlington ("CCDA") was funded to provide an educational program solely for Catholic schools or religious classes in Catholic parishes. J.A. 211-12.³³ Recruitment was done through pastors or directors of religious education, R. 80, 82-84; R. 75, 53-55, 85-86,³⁴ and the

32 The district court found:

Family of the Americas Foundation ("FAF"), for instance, is an affiliate of "WOOMB-International," an organization without discernable [sic] religious ties. But WOOMB's "Aims and Objectives" states that the organization was "inspired by the Encyclical *Humanae Vitae*," the papal [sic] encyclical setting forth Catholic dogma on birth control and abortion.

J.S. App. 35a; see also R. 155, A., V, 41. In a letter to the President of the Pontifical Council for the Family, Mercedes Wilson described her organization as "a lay organization, strongly committed to the implementation of the teachings of the *Humanae Vitae* and *Familiaris Consortio*." J.A. 627. One FAF brochure states that the BOM is the "Christian Alternative," R. 230, Ex. 1, and FAF's letterhead states: FAF, Inc., WOOMB, USA, "The Christian Alternative." J.A. 629 (emphasis added).

33 See also R. 80, 23-25; J.A. 222-23.

34 Similarly, the grant application of Catholic Social Services of Wayne County (CSS) indicated that recruitment for its prevention program was to be centered on churches, the Catholic Youth Organization, parochial schools and public schools. R. 155, A., IV, 364.

only "manuals" listed as reference sources for the program were explicitly religious. R. 155, A., III, 46. Every AFLA presentation of the CCDA included a lecture on the church's teachings by a priest. R. 75, 75-76; R. 79, 17, 20-22; R. 80, 67-68, 91-92, 223. In some instances attempts were made to give the appearance that the religious lecture was separate but as the district court found:

[S]ome grantees . . . establish[ed] programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer. This transparent attempt to isolate the sectarian from the secular is unconvincing

J.S. App. 37a (citations omitted).³⁵

Catholic Family Services of Amarillo, Texas ("CFS"), like CCDA, identified itself as part of the Catholic Church with the "Bishop retain[ing] authority" over CFS "where basic doctrine is at issue." R. 181, Watson Decl. ¶ 2. Like CCDA, CFS proposed to use AFLA funds to expand sex education programs "through the parish social ministry." R. 155, A., IV, 83.³⁶ From the beginning of funding in May 1984, CFS held twenty-one prevention programs in churches, parochial schools and Catholic family services; only three programs were held in non-sectarian settings. R. 181, Watson Decl. ¶ 11. Its continuation application explained: "What has seemed most feasible has been to contact church groups and have them *sponsor* such sessions *for* church members with an invitation to the general public." *Id.* at 86 (emphasis added). CFS used a curriculum outline guide for the AFLA parent workshops with explicit theological references, *see id.* at 101B; R. 181, Watson Decl.

³⁵ A secular grantee, Northwest Louisiana Health Department, also sponsored AFLA workshops at churches which were accompanied by religious presentations about sex. J.A. 568, R. 155, A., IV, 197-204.

³⁶ The care component proposed pregnancy counseling where case-workers would discuss "the detrimental effects" of abortions, as well as "the destruction occurring to an unborn infant," although an effort would be made not to put "heavy" guilt feelings on the teenager. J.A. 513.

¶ 22D, as well as religious materials as "reference" materials, *see* R. 155, A., IV, 90-101, 103-106.³⁷

The district court found that St. Margaret's Hospital is "a self-described 'Christian institution' committed to acting 'in harmony with the teaching of the Catholic Church.'" J.S. App. 33a.³⁸ Out of the one hundred institutions named in St. Margaret's grant application to receive AFLA education courses, ninety-six were Catholic schools, churches or parish religious educational programs. R. 155, A., II, 38-42. *See also* J.A. 554; R. 229, Ex. 3. The grant expanded St. Margaret's program, which is based on the premise that family breakdown is due to "secularism," and "widespread ignorance" "of the ideal of holiness inherent in the basic tenents [sic] of Judeo-Christian beliefs." J.A. 515. Its stated objective was to emphasize the "pastoral intervention of the church," because "[s]piritual guidance is essential to maintain spiritual purity." *Id.*

³⁷ Materials with "strong religious emphasis" were given to some participants although the explicit references to scripture and other theological orientation were deleted. R. 181, Watson Decl. ¶ 22. CFS admitted using the film "Everyday Miracle," which they describe as "depicting the miracle of the process of human reproduction as a gift from God." R. 155, A., IV, 119; R. 181, Watson Decl. ¶ 22E. The study guide for another film, attached to their continuation application, included "suggested Scripture readings" and a section called "Theological Orientation." J.A. 559.

³⁸ Grantee Good Samaritan Hospital, also a "Catholic sponsored health care facility," R. 155, A., IV, 158, was funded, as the district court found, to provide "spiritual counseling." J.S. App. 36a; R. 155, A., IV, 181. Intervenor criticizes this court's finding stating: "[w]hat the court did not point out is that the proposal for spiritual counseling was *rejected* by the secretary as '*not legally permissible*.'" Int. Br. 42. This statement, like others characterizing the facts, distorts the record. Over a year-and-a-half after SUMA was funded, an QAPP staff member wrote a letter stating:

In one of the documents you provided us, there was a reference to spiritual counseling services provided by the Inter-Parish Ministry. If this is part of your project, it is *not legally permissible* in a federally funded project and you should revise the project accordingly.

J.A. 676 (emphasis in original). Obviously HHS did not even know what its grantee was doing, gave no specific guidelines for revising the program, and offered no evidence that any steps were ever taken beyond this letter to ensure that the religious aspects of the program—only one of many—were discontinued. *See* R. 155, A., IV, 159, 169.

c. OAPP Condoned The Promotion Of Religious Doctrine.

For a year-and-a-half, St. Margaret's AFLA program used AFLA funds to teach an explicitly Catholic curriculum with references to God, Christ and Christian tenets in over ninety parochial schools in Boston. J.S. App. 36a, 37a; J.A. 417-26; R. 231, 95-104.³⁹ After this obvious constitutional violation could no longer be ignored, HHS nevertheless allowed the same teachers to use the "same" curriculum tailored to Catholic theology in the public schools with only the explicit references to "God" or religion removed, J.A. 404, 410, 413, 416; R. 231, 157,⁴⁰ and re-funded St. Margaret's for three more years, J.A. 754.

Despite the references in many grant applications to religion, presentations in churches and involvement of clergy, no meaningful investigation was undertaken by HHS before awarding the grants. J.A. 158-59. One grantee, CCDA, was even viewed by Sheeran and an HHS attorney-consultant as nothing more than a "glorified Confraternity of Christian Doctrine program." J.A. 109-11. The only HHS response was to order Sheeran to call only the Catholic grantees which had already been selected for funding but before the official award. J.A.

39 The St. Margaret's tenth-twelfth grade curriculum instructs that: "The Church condemns . . . contraception . . . [b]ecause it deliberately frustrates the natural power of conjugal acts to generate life, is a grave sin and is intrinsically evil. (Pius XI—Casti Connubii)." J.A. 423.

40 On April 16, 1984 Mecklenburg wrote Sister Natwin at St. Margaret's Hospital that due to this lawsuit the religious curriculum could not be used with AFLA monies because to do so makes "Federal funds . . . susceptible to being used to advance particular teachings of the Catholic Church." J.A. 518 (emphasis added). Four months later St. Margaret's responded by stating that it was "currently able to provide expanded program services in public school settings such that the federal funds will be utilized solely in the public school settings." J.A. 520 (emphasis added). The public school and private school curriculums were seen by the education director as the "same curriculums." J.A. 411; see also J.A. 401, 402. Health educators who teach in the AFLA program were trained with both curriculums simultaneously. J.A. 411. Although the public school curriculum does not contain the sections entitled "The Church's teachings," the curriculums were otherwise identical including stressing the preferability of "natural" contraception, the immorality of abortion, and the abortifacient qualities of the IUD. R. 155, A., II, 477-92.

106-107, 160-61. The officer obtained assurances that they would not use AFLA money for "teaching religious classes." J.A. 107. No specific inquiry was made about the use of church and parochial school facilities, reliance on religious literature, or the effect on the programs of the grantees' religious missions. The calls lasted two or three minutes. J.A. 112-13.

Director Mecklenburg viewed the "involvement of churches" as consistent with the "intent" of the programs called for under the AFLA. J.A. 71-72.

d. Grantees' Activities Were Governed By Religious Requirements.

Because some grantees are governed by religious dictates, the services and information teenagers receive are far more restrictive than required by the statute.⁴¹ And, whether abiding by these statutory restrictions or going beyond them, grantees viewed their reasons for promoting abstinence⁴² and adoption over abortion as religious and not statutory or secular.

AFLA grantees *may* provide *referral* for abortion counseling to a pregnant adolescent upon the parent's request. § 300z-10(a) (emphasis added). Nevertheless, solely because of religious dictates many AFLA grantees will not refer teenagers for abortion even if requested to do so by the adolescent and her parents. St. Ann's refusal to provide abortion counseling even if requested was inconsistent with the AFLA and, as found by the district court, was intended instead to conform to the

41 Their religious missions do not merely "coincide[] with the purposes of the governmental program," Int. Br. 7, they far exceed them.

42 For example, at St. Ann's "premarital abstinence" was not taught as a secular value but rather as a religious one. St. Ann's course outline refers to II Samuel 13 of the Old Testament in substantiation of the principle that sex outside of marriage may involve the "danger of egotistic reasons" for intercourse. J.A. 347. Another AFLA purpose is to prevent *adolescent* sexuality and adolescent pregnancy. § 300z(a)(10)(A). Nevertheless, grantees for religious reasons teach that premarital sexuality at any age is wrong. See R. 155, A., III-A, 492-93, 517.

religious philosophy of the Catholic Church that abortion is a sin.⁴³ J.S. App. 34a; R. 155, A., III-A, 475-76.⁴⁴

Although projects may not provide family planning services “unless appropriate family planning services are not otherwise available in the community,” § 300z-3(b)(1), there are no statutory restrictions on counseling and referral services and no limits on the kinds of family planning that can be discussed. Nevertheless, solely because of religious dictates, some AFLA grantees only teach and refer for natural family planning (“NPP”) which “has never been used successfully with teenagers,” J.A. 535. For religious reasons, St. Ann’s, J.S. App. 33a-35a, St. Margaret’s and FAF⁴⁵ will not refer program participants for contraceptives and because CFS “is Catholic, no contraceptive devices or birth control pills will be offered.” R. 155, A., IV, 126.

All Catholic hospitals and health facilities are required to follow the *Ethical and Religious Directives for Catholic Health Facilities* (“*Religious Directives*”) which govern the delivery of medical care, largely in the area of reproductive health. J.A. 526, 540-44.⁴⁶ Thus, although Catholic hospitals do not generally practice medicine in a sectarian way, their obstetrical and

43 St. Ann’s Employee Handbook requires the hospital to function “according to Christian principles as taught by the Catholic Church.” R. 155, A., III-A, 475.

44 Similarly, employees of Catholic Charities of Arlington were prohibited from taking any “action inconsistent with Catholic doctrine, such as recommend[ing] abortions for clients.” R. 181, West Decl. ¶ 4. And employees at St. Margaret’s may not make referrals for abortion because it would not be “in accordance with teachings of the Catholic Church.” J.A. 408.

45 Offering methods of contraception other than NFP is not allowed at St. Margaret’s “[b]ecause it is in conflict with the teachings of the Catholic Church.” J.A. 407. The director of FAF has stated: “Because of our religious beliefs, we cannot provide nor refer couples to programs that offer artificial methods of birth control, sterilization and abortion.” J.A. 628.

46 The *Directives* state: “Any facility identified as Catholic assumes with this identification the responsibility to reflect in its policies and practices the moral teachings of the Church, under the guidance of the local bishop. . . . The Catholic-sponsored health facility . . . further, carr[ies] an overriding responsibility in conscience to prohibit those procedures which are morally and spiritually harmful.” J.A. 541 (emphasis added).

gynecological units do.⁴⁷ Religiously imposed restrictions on abortion and sterilization interfere with the secular practice of medicine, which results in harm to the patients. J.A. 543-44, 546.

All medical personnel are required to comply with the *Religious Directives* regardless of their own personal and professional opinions. J.A. 526; J.S. App. 33a-34a. Both a physician and a nurse who worked at St. Margaret’s believe that the obstetrical and gynecological care given at the hospital “is dictated by Catholic religious directives which are often counter to the patients’ best medical interests, the current standard of medical care as practiced in secular institutions, and medical ethics.” J.A. 525, 549-50.⁴⁸ Because of these requirements, physicians are unable to give their patients full informed consent and are prohibited “from performing, prescribing, recommending or even referring for sterilization, abortion or contraception.” J.A. 527, 550. Medical personnel are “required to treat the embryo as a person from the moment of conception regardless of whether this belief is shared by the woman.” J.A. 527 (citation omitted).⁴⁹ Consequently, women are forced to endure greater risks to their health, not as a result

47 Under the AFLA even secular grantees involved religion in their care services. For example, Lyon County Health Department stated that under its “care” component, “[s]piritual counseling will be promoted” and “[e]ach pregnant adolescent and her family will be urged to make one formal contact with a church minister.” R. 155, A., IV, 226.

48 Dr. Louis Laz and Nurse Kim Maisenbacher each submitted affidavits. The Duncan Affidavit submitted by HHS, J.A. 677-80, does not refute these affidavits. While Dr. Duncan, Medical Director at St. Margaret’s, disputes how harmful the effect of the religious guidelines are, he admits that the care given is “within the guidance of the religious directives.” J.A. 678.

49 Dr. Laz explained,

Patients are never told prior to accepting care at St. Margaret’s that regardless of their personal choice or health needs, they will never receive these procedures, or referrals, or be counseled in all available medical options. St. Margaret’s has Haitian, Southeast Asian, Hispanic, and other non-English speaking patients who do not even know that abortion or sterilization are legal options. And, no matter what strain on their health and life their pregnancy might present, they will not find out about these options.

of their beliefs, but because of the federally funded religious practices of the grantees. See J.A. 529-30.

e. HHS And AFLA-Funded Programs Convey To The Public That The Government Supports Religion.

AFLA's endorsement of religion is evidenced by letters telling applicants that they were rejected because, for example, "there is no evidence that local churches or pastoral help and training will be used." R. 155, A., I-A, 505E.

As the district court found, "the fact that AFLA programs were held in rooms full of religious symbols" and that there was "joint presence of denominational personnel and federally funded employees" created the "symbolic tie, if not actual tie, between government and religion." J.S. App. 37a & n.17. In addition, in many instances the publicity for AFLA programs linked the receipt of federal funds to specific religious tenets of particular religions. This created the public impression that the federal government approved and sponsored the doctrines of certain religions.⁵⁰

Catholic Social Services of Wayne County advertised its program with a flyer announcing:

A parish resource . . . Catholic Social Services of Wayne County presents: CASI* COMMUNICATION AROUND SEXUAL ISSUES . . . In keeping with the Pope's strong guideline, Catholic Social Services of Wayne County developed and received funding for a special program

The asterisk refers the reader to the bottom of the flyer which states "*C.A.S.I. is a Federally funded Adolescent Family Life Demonstration Project." J.A. 576. CSS's publicity efforts were designed to reach a primarily Catholic audience. R. 155, A., IV, 358-59; J.A. 576.

⁵⁰ The religious nature of sexuality education was so interwoven with the "secular" for Catholic Charities of Arlington that the Bishop's announcement about the program explained that while federal money could not be used to "teach" religion, "Charities staff" would be "coordinating efforts with pastors, directors of religious education and other Diocesan offices as appropriate to provide the *religious dimension*." J.A. 213 (emphasis added).

Catholic Family Services of Amarillo, Texas, announced in a press release that was attached to their AFLA progress report that "the Adolescent Pregnancy Care and Prevention Program is a welcome addition and will provide new opportunities to carry out the mission of Catholic Family Services." J.A. 155. That mission as stated on page one of its grant application includes "emphasiz[ing] the truth of Christ through which a loving God makes Himself available to all persons." *Id.*; R. 155, A., IV, 72. News articles announcing the Catholic Family Services grant linked the Federal money with Catholic beliefs.⁵¹

The University of South Carolina sent letters to ministers who failed to attend a Minister's Action Coalition meeting set up under the AFLA program. The letter stated in part:

It really is up to the churches of our community to define what behavior is morally acceptable and advisable. The churches have traditionally set the moral standards for the community.

R. 155, A., IV, 422-23. This sent a message of government endorsement of religious groups defining what sexual behavior and life decisions are morally acceptable. Similarly, Lutheran Family Service sent out "Dear Pastor" letters announcing the grant, asking them to "share a message from Lutheran Family Service at one of your next circuit meetings," and informing them that among others they would be seeking ideas from the "church community" "as to the most appropriate scenarios" for their adoption advertisements. *Id.* at 245.

In addition, as the court found, "the overwhelming number of comments shows that program participants⁵² believed that

⁵¹ An article appearing in the *Amarillo Globe Times* (Nov. 24, 1982), announced that CFS of Amarillo had received a \$250,000 grant from the federal government for the development of education and counseling services for adolescents. The article goes on to note that "The agency, due to *religious doctrine*, recommends adoption for children born to young *unwed* mothers." J.A. 561 (emphasis added). Another article about the government grant stated: "Since the agency [CFS] is Catholic, no contraceptive devices or birth control pills will be offered." R. 155, A., IV, 126.

⁵² Likewise, secular grantee Northwest Louisiana Adolescent Family Life Project aimed its programs at a narrow audience belonging to "churches, church facilities, parochial schools and other religious institutions." R. 155, A., IV, 197-209.

these federally funded programs were also sponsored by the religious denomination." J.S. App. 37a.

f. The Values Promoted By The AFLA Are Of Core Theological Concern To Some Religions.

The values promoted by the AFLA, including the encouragement of premarital chastity and adoption and the discouragement of abortion, may very well be secular values under some circumstances. Nonetheless, they lose their secular nature when promoted in theological terms or taught by religious figures or institutions.

As the district court found, "the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion . . . are fundamental elements of religious doctrine." J.S. App. 28a. Thus, by providing aid to religious organizations for the purpose of teaching these values, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." J.S. App. 30a.

Plaintiffs submitted unrebutted evidence establishing that, for religious groups, abortion and other issues relating to sexuality are religious issues.⁵³

Plaintiffs also established that the issue of abortion is deeply divisive among religious denominations. The position a particular religious group takes on abortion depends on that group's theological beliefs concerning, for example, the value of the fetus, the value of the woman's life and well-being, the importance of individual decisionmaking, and the role of sexuality. J.A. 595, 599, 601-05.

⁵³ Dr. Paul Simmons, a Baptist Minister and professor of Christian Ethics, stated:

The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity and abortion involve religious values and theological or doctrinal issues. In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings.

J.A. 597; see also J.A. 607.

While some religious groups have tenets that make abortion a sin, others deem abortion to be a religious choice to be made by the individual, and still others believe abortion to be religiously required in some circumstances.⁵⁴

The related issues of premarital sexual intercourse and birth control are also religious matters of central importance to religions and about which religions disagree. By requiring religious organizations to be involved in a program designed to stress sexual chastity prior to marriage, rather than abstinence or the use of birth control during adolescence, the AFLA inevitably furthers the theological beliefs of certain religions over others.

The teachings of the Roman Catholic Church emphasize the sacred nature of the marital relationship and condemn not only abortion, but all "artificial" means of contraception. Pope Paul VI, encyc. letter *Humanae Vitae: Acta Apostolicae Sedis* 60 (1968), reprinted in *The Papal Encyclicals, 1958-1981*, 223, 226-27 (C. Ihm, ed. 1981). Natural family planning is the only form of birth control acceptable to the Catholic Church. *Id.* at 227.⁵⁵ Many conservative Protestant sects have similar views. See R. 155, A., I, 80-81, 84; R. 155, A., VI, 136, 152.

By contrast, the Jewish faith does not condemn the use of contraceptives. See R. 120, 18-19. The view of the religious plaintiffs is that decisionmaking is the responsibility of the individual and the role of the church is to provide information

⁵⁴ In fact, under Jewish law, where pregnancy threatens the life or health of a pregnant woman, it is her religious duty to have an abortion. J.A. 600. Methodist teachings hold not only that a pregnant woman should be permitted to make her own decisions regarding pregnancy but also that she should be counseled on all available options, including abortion. J.A. 606.

⁵⁵ The government agreed with the following characterization by the plaintiffs of the Catholic Church's position on these issues:

Another religious tenet of the Roman Catholic Church holds that "Sexual intercourse divorced from the context of procreation loses its significance, exposes the selfishness of the individual, and is a moral disorder." Vatican Congregation for Catholic Education entitled "Educational Guidance in Human Love," Nov. 1, 1983.

J.A. 684. Compare R. 120, 53-54 ("chastity as an absolute which would lead to celibacy is not condoned at all in the Jewish community").

and guidance to help the individual exercise his or her own moral judgment. See R. 121, 20, 22-23, 28, 46-47; R. 118, 19, 49, 59; R. 119, 15, 26, 29, 38-39, 40-41; R. 122, 38, 58, 62-63.⁵⁶

g. The AFLA Promotes Certain Religious Denominations While Denigrating Others.

The AFLA anti-abortion restrictions have limited religious grantees to those with theological dictates opposed to abortion. Religions that view the decision whether to have an abortion as a matter of individual conscience or as sometimes religiously mandated cannot, consistent with their religious views, teach an AFLA sex education course or implement an AFLA case project which forbids the mention of abortion in pregnancy counseling.

The Act's discrimination among religions is revealed by the self-selecting application process. Of the fifty AFLA grant applicants in 1982 that are immediately identifiable as religiously affiliated organizations, all but one share the Act's anti-abortion bias. R. 107, Ex. 7.⁵⁷ Of the identifiable religiously affiliated grantees receiving funds under the AFLA, *all* have been conservative *Christian* groups.

Religions are disadvantaged by the government's endorsement of only those religions whose doctrines coincide with the values to be promoted by AFLA. Plaintiff ministers all testified that their work has been made more difficult by the

56 The reason intervenor defends the AFLA is because it furthers particular religious beliefs. In the district court, intervenors argued that enjoining the AFLA would interfere with the free exercise of religion "of parents, including defendant-intervenors, whose religious faiths forbid abortion and premarital sex and require them to raise their children according to these tenets." R. 147.

57 In addition to submitting affidavits and other unrebutted evidence of the applicants' positions on abortion, see R. 155, Statement, I, ¶ 24, plaintiffs asked the court below to take judicial notice of the applicants' religious beliefs on abortion, pursuant to Fed. R. Evid. 201. See *United States v. Kahane*, 396 F. Supp. 687, 692 (S.D.N.Y.), modified on other grounds, 527 F.2d 492 (2d Cir. 1975). Thirty-eight of the identifiably religious applicants were affiliated with the Roman Catholic Church, ten were Protestant groups that adhered to tenets opposing abortion, and one was a Mormon group that also opposed abortion. The one remaining organization was affiliated with the Methodist Church and was not funded. R. 107, Ex. 7.

AFLA's sponsorship of religious beliefs antithetical to their own. For example, Reverend Vaughn, who teaches a sex education course for teenagers near the AFLA funded course taught by Catholic Charities, testified that because the AFLA put the "whole weight of Government . . . behind a particular view of sexuality," he had to put more time and effort into articulating how Methodist beliefs on sexuality differ from those of other faiths. R. 122, 25-27, 38-40. He described counseling an adolescent who had attended a sex education program taught by him as well as an AFLA-funded sex education program sponsored by Catholic Charities of Arlington. *Id.* at 19-21.

The AFLA also interferes with the religious beliefs of many of the adolescents who participate in the funded programs. The government claims that the religiously affiliated grantees, like other grantees, provide funded services without regard to the recipients' religious affiliation. See, e.g., J.A. 438, 442, 451, 460, 494. But this simply means that all adolescent participants, including adolescents whose religious beliefs differ from those promoted by the AFLA as well as those with no religious beliefs at all, are exposed to the same government-sponsored, religious values and tailored information. All "patients" as well as employees of Catholic health facilities must "respect and agree to abide by" the Ethical and Religious Directives of Catholic Facilities which require adherence to Catholic doctrine on reproductive health. J.A. 541. The student comments that are available from the St. Margaret's and St. Ann's programs indicate that they recognized the religious content of the federally funded programs:

I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip.

.....
J.A. 522.

Even though this is a Catholic school, I feel the actual facts are more important than moral issues and how the church feels.

R. 155, A., II, 495.⁵⁸ Unsolicited comments from a participant in St. Ann's program about a lecture on "intimacy" complained that many of the girls felt that the lecture was "a preached sermon" and that they didn't like "being preached at." J.A. 373.

As plaintiffs have thoroughly documented, the religiously affiliated grantees did, in fact, use AFLA funds to teach and provide care in accordance with their own religious dictates. See *supra* pp. 9-22. One book used for at least a year and a half in the St. Ann's program denigrated both Judaism and Eastern religions.⁵⁹ Furthermore, both secular and sectarian organizations funded under the AFLA discriminated among religious denominations in involving religious and community organizations pursuant to the AFLA.⁶⁰

⁵⁸ Other students wrote:

More information on birth control, but not how the church feels.

The most effective birth control other than what the Church approves of. She spent so much time on the natural family planning (rythm [sic] method) as a good thing because the Church approves it but she failed to mention that it is not good for teenagers to use this method—it's not really safe.

J.A. 522.

⁵⁹ R. 106, Ex. 15, 41-42, 167-68. This was one of the two books HHS eventually asked St. Ann's to discontinue using. See *supra* p. 14 n.29.

⁶⁰ SEMO reported that they "avoid ministerial alliances and other ecumenical groups" because "anything the ministerial alliance is for, the more fundamentalist churches are likely to be against." J.A. 566. A state grantee, the Woman's Advocacy Bureau of the Louisiana Department of Health and Human Resources, stated that it would involve "the major religious denominations in the Baton Rouge area, including Catholic, Baptist, and Methodist." R. 88, Vol. 4, Grant 102, Response #3 (emphasis added). Grantee Family Service Agency of San Francisco notified HHS that it would include only "San Francisco Council of Churches, [and] Catholic and Jewish Religious Representation." *Id.*, Grant 101, Response #3. The

SUMMARY OF THE ARGUMENT

No prior case before this Court has ever documented so thoroughly a statute's actual advancement of religious belief and the spiritual and physical harm resulting from that advancement.

This Court has recently stated that the Establishment Clause "primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985) (emphasis in original) (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)). Plaintiffs' uncontested facts establish, and the district court held, that the AFLA flouts all three of these proscriptions. Under *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971),⁶¹ this Court must declare the AFLA unconstitutional.

The AFLA endorses religion by requiring all programs funded under the Act to involve religious organizations; by failing to provide statutory assurances that public money will be used only in secular ways; and by selectively funding only those religious groups that hold specific theological views on sexuality and reproduction.

Pursuant to the Act, the government has funded both secular and sectarian grantees to teach religion in public and parochial schools. The government has funded grantees to teach Catholic doctrine on chastity, masturbation, homosexuality,

Director of the AFLA program of Catholic Social Services of Wayne County stated that invitations for membership on the AFLA advisory committee ("open to all who chose to participate") were sent to "clergy from both Protestant and Catholic churches" and reported that "clergy (Catholic and Protestant)" were represented over time on the committee. R. 181, Zettle Aff. ¶ 112.

⁶¹ This Court has used the *Lemon* test in cases ranging from giving direct aid to parochial schools, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to giving churches political power, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to erecting religious symbols in public settings, *Stone v. Graham*, 449 U.S. 39 (1980); *Lynch v. Donnelly*, 465 U.S. 668 (1984), to imposing regulations that entangle church and state, *Aguilar v. Felton*, 473 U.S. 402 (1985). Properly applied, the *Lemon* test invalidates the AFLA even more clearly than in these prior cases.

ality, birth control and abortion, and to provide programs that included the "Biblical and theological views regarding sex." J.A. 568. The government has funded health care programs that are restricted by religious dictates which may conflict with adolescents' health needs. This government funding has the effect of enhancing the stature and political influence of some religious groups and of sending an unmistakable message of government endorsement of particular religious views.

The district court found it "impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a. This holding is amply supported by the religious character and purpose of the institutions, the nature of the aid, which is highly susceptible to the infusion of religious beliefs, and the extensive and continual monitoring by the government of religious activity that would be necessary to ensure secular use of AFLA funds.

The far-reaching theories put forth by the government and intervenor cannot obscure the simple fact that Congress has promoted and continues to promote religion through the AFLA. This case is *not* about the constitutionality of religious organizations' participation in programs established under properly constructed statutes respectful of the establishment clause's limiting principles. The issue in this case is whether we will continue to operate within a system of government that is separate from religion, and which does not "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1 (1947). If the government may fund, as it does under the AFLA, both religious institutions and secular institutions to promote religious beliefs, then the protection offered by the religion clauses will be nothing more than a paper promise.

I. THE AFLA VIOLATES THE LEMON "EFFECTS" TEST BECAUSE IT IMPERMISSIBLY ADVANCES RELIGION.

There can be no question that the AFLA not only risks the advancement of religion but that it actually does advance

religion. The AFLA's mandates on religious involvement give religion a preference over nonreligion. HHS funding decisions carry out the legislative intent to promote religion.

For example, the only 1982 program that was not re-funded—not because it was too religious, but because it was not religious enough—was the University of Arkansas. Sheeran testified that despite receiving the Arkansas Medal of Excellence, a positive review from OAPP staff and high scores on an objective scale,⁶² the University of Arkansas program was not re-funded because Mecklenburg "caved in" to pressure from people who felt the materials used by the university were "Godless" and violated their religious beliefs. J.A. 132-34. Instead, the grant went to FAF, an indisputably religious organization, which received a grant seven times as large. J.A. 751-52. Mecklenburg testified that FAF's program, which promoted a religious philosophy, J.A. 143, was "more complementary and provided a different perspective" than that of the University of Arkansas. J.A. 83.⁶³

The government goes badly astray when it implies that as long as the benefited institutions are not "pervasively sectarian," sectarian activities may be subsidized. Gov. Br. 27. The "pervasively sectarian" inquiry is useful only because it identifies institutions for whom no degree of legislative care in the disbursement of aid will suffice to ensure that funds are used solely for secular ends. But where cash grants have not been restricted to secular purposes by statute, or worse, where they have been designated for sectarian purposes, ruminations

62 Although the University of Arkansas was told by OAPP that the reason they were not re-funded in 1983 was that they "did not score . . . high enough," OAPP officials admitted in depositions that they lied. J.A. 135; R. 107, 128.

63 FAF's identical 1982 application scored so low it was not even considered for funding. Two government agencies would not approve or recommend FAF for funding and the grants manager for HHS Region VII noted that FAF proposed to "promote its values at public expense." R. 155, A., I-A, 539-42; J.A. 145.

about the degree of sectarianism are not necessary.⁶⁴ This Court's prior cases involving government aid to religious institutions, from *Everson v. Board of Education*, 330 U.S. 1 (1947), to *Aguilar v. Felton*, 473 U.S. 402 (1985),⁶⁵ make clear that the heart of the effects analysis is not the pervasively sectarian inquiry, but whether the proffered assistance can reliably be limited to secular ends to ensure that a sectarian enterprise is not advanced.⁶⁶ Numerous AFLA grantees in this case were in fact "pervasively sectarian," but the AFLA program fails constitutional muster for two independent, analytically prior, reasons: The AFLA grants are not statutorily earmarked for solely secular purposes, and they are, in fact, earmarked for specifically sectarian tasks.

A. The AFLA Is Unconstitutional Because It Funds Specifically Religious Activity And Religious Institutions.

The district court found that both on its face and as applied the AFLA has a primary effect of advancing religion. J.S. App. 27a, 32a. Congress intended, and the statute explicitly requires, religious organizations to participate in AFLA programs as either grantees or as paid or unpaid participants.

Although 1982 grantees were told at an orientation conference that they could not teach religion, they were simultaneously told that they could base their programs on religious principles, that they should involve "churches," and that the AFLA was a joint project between churches and the federal government to promote chastity. J.A. 120-27, 163-64. The

⁶⁴ In *Nyquist*, 413 U.S. 756, and *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), the Court struck down various forms of state aid to parochial schools. The Court premised its decisions on the fact that the proffered aid could not be restricted to secular ends rather than on a finding that the schools were "pervasively sectarian."

⁶⁵ The chart that appears as Appendix C to this brief suggests a framework for understanding this Court's government aid cases under the *Lemon* effects test.

⁶⁶ Thus, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the plurality first determined that the statute adequately segregated the funds and then stated that the plaintiff could therefore prevail only if he demonstrated that recipient institutions were "pervasively sectarian." *Id.* at 679-82.

written outline for the OAPP staff presentation to orient AFLA grantees in November 1982 stated:

Will this program succeed? Churches have been involved in this area for a long time. Their efforts have not been 100% successful However, we do hope that through joint efforts between public and private entities including churches and the Federal Government we will have a significantly beneficial impact on the problems associated with adolescent pregnancy.

J.A. 163. This reinforced the unique and central theme of the legislation: to unite government and religion in a joint effort to promote sexual abstinence and adoption.

It is clear that the AFLA has a primary effect of advancing religion and is therefore unconstitutional under the second *Lemon* prong, because it funds "specifically religious activit[ies]." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). This is not a case requiring the Court to predict the likelihood that government funds will be used for religious purposes;⁶⁷ the evidence is overwhelming that funds, in fact, advanced religion. Anne Ridder recalled that Reverend Creeden, speaking at one of the programs presented by Catholic Charities of the Diocese of Arlington, told parish adolescents and their parents:

You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body

⁶⁷ Appellants incorrectly cite *United States v. Salerno*, 95 L.Ed.2d 697 (1987), for the proposition that the AFLA must be deemed constitutional on its face unless plaintiffs "establish that no set of circumstances exists under which the Act would be valid." Gov. Br. 30. This standard does not apply to challenges based on the Establishment Clause; numerous cases have explained that the mere risk of establishment of religion is sufficient to warrant invalidation of a statute. See *Lemon v. Kurtzman*, 403 U.S. at 612 ("A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment") (emphasis in original); *Grand Rapids*, 473 U.S. at 388-89 ("[T]here is a 'substantial risk' that programs operating in this environment would 'be used for religious educational purposes'. . . . Thus, the lack of evidence of specific incidents of indoctrination is of little significance."). That is, the risk itself constitutes the Establishment Clause violation. See also *Meek v. Pittenger*, 421 U.S. 349, 370-72 (1975).

of Christ. The teaching of you and the things you value are, in fact, the values of the Catholic Church.

J.A. 226. Certainly, appellants cannot deny that St. Margaret's used federal money to promote "the church's teaching" on sexuality, or that Catholic Charities of Arlington presented and facilitated a session on the church's teaching at every funded program, or that Catholic Family Services of Amarillo used a curriculum guide with explicit religious references. Nor can they deny that secular grantees like Charles Henderson and SeMo sought to strengthen and promote church teachings and institutions as a means of discouraging teenage sexuality and abortion. *See supra* pp. 9-22.

Moreover, plaintiffs proved that grantees used federal money to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs. Cf. *Edwards v. Aguillard*, 96 L.Ed.2d 510, 520 (1987) ("'[T]eaching and learning' must not 'be tailored to the principles or prohibitions of any religious sect or dogma.' " (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968))). St. Margaret's used a parochial school curriculum designed to promote Catholic doctrine. Its public school curriculum, based entirely on its parochial school one, was fundamentally the same. J.A. 411. Search Institute and St. Ann's developed curriculums directly derived from a pre-existing Catholic curriculum. St. Ann's used a curriculum that referred repeatedly to God and Christianity and also gave skewed information on contraceptives to conform with church teachings. J.A. 294-96, 316-17, 337, 350-53, 360-61, 363-64. SeMo "encourag[ed] churches to use sexuality education materials already available through their denomination[s]," J.A. 566, and Memorial General Hospital sponsored sessions that asked "How have our values changed since Christ's day?" R. 155, A., IV, 292.

The AFLA's impermissible effects are not limited to recipients of grants or subgrants. Those religious groups that are singled out to be AFLA participants or are AFLA advisory board members also gain a benefit by virtue of the government endorsement of their beliefs and of the power granted them by HHS or local government AFLA grantees to approve or shape AFLA programs or materials. When *only* Catholic or Protestant clergy are invited to be on the advisory committee of an

AFLA program, *see, e.g., id.* at 346, or when "conservative fundamentalist churches" are contacted first and targeted for special attention, J.A. 565-66, these religious groups also receive a government endorsement even though they do not receive funding.⁶⁸ Cf. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

By ensuring the involvement of religious groups in the teaching of specific sexuality values, the AFLA on its face impermissibly funds "specifically religious activity" under the AFLA program—an independent measure of the AFLA's unconstitutionality. It violates the "core rationale underlying the Establishment Clause [which] is preventing 'a fusion of governmental and religious functions.'" *Larkin*, 459 U.S. at 126 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).⁶⁹

The subject matter of AFLA programs heightens the risk of religious advancement. It may be that no subject is inherently "religious" or "secular" in all contexts. References to the afterlife or to the existence of a divine Creator acquire a different tenor from the pulpit than in a class on medieval philosophy. The subjects of the AFLA—intercourse, contraception, abortion—may not be forever and in all circumstances "religious" issues. But in the hands of religious institutions, often limited by adherence to religious authority on these very same issues,⁷⁰ acting on the instructions of a statute that

68 Of course, plaintiffs are not contending that the mere presence of a clergymember on a government-sponsored panel is constitutionally suspect.

69 Cf. *Schempp*, 374 U.S. at 281 (Brennan, J., concurring) ("While I do not question . . . that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.").

70 "There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching" of sexual education. *Edwards*, 96 L.Ed.2d at 523 (discussing evolution). In one book for teenagers used by an AFLA grantee for at least a year and a half, teenagers were taught "[t]he crucifixion was a passionate, symbolic, physical gesture of love as intercourse is." Intercourse is "the seal of a covenant that will last until

demands religious involvement—the risk that these subjects will be taught in a religious way is constitutionally unacceptable.⁷¹

As the district court noted, and based on plaintiffs' uncontested evidence, these issues are of fundamental religious importance. And in the public arena they have taken on special significance marking central denominational difference and strife.⁷² “[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws.” *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

Intervenor argues that the centrality and divisive nature of sexuality issues to religious groups is irrelevant because “[v]irtually every activity conducted by religious organizations is related to their religious mission.” Int. Br. 16-17.⁷³ It argues

death.” “The good news about sex is that Jesus Christ has made it the expression of a level of love that is proper to God alone.” R. 106, Ex. 15, 165-66, 174.

71 This case is plainly distinguishable from *Harris v. McRae*, 448 U.S. 297 (1980), where this Court found that the Hyde Amendment, which cut off Medicaid funds for abortion, did not violate the Establishment Clause because the congressional purpose could have been morally or ethically based. *Id.* at 319. The AFLA, however, involves funding religious organizations, for whom abortion is clearly a religious issue, in teaching anti-abortion values. Plaintiffs are *not* arguing, as was argued in *McRae*, that discouraging abortion is an unconstitutional religious purpose behind the AFLA. Plaintiffs argue only that government funding of religious groups to teach anti-abortion values creates an unconstitutional risk that religious values will be promoted.

72 Archbishop O'Connor, for example, has stated “I don't see how a Catholic in good conscience can vote for a candidate who explicitly supports abortion,” N.Y. Times, June 25, 1984, § IV, at 13, and that abortion is his “No. 1 priority,” National Catholic Rep., Feb. 10, 1984, at 20.

73 Furthermore, for the Catholic Church, issues of sexuality play a role of fundamental importance, treated at least in some ways differently than the issues of poverty and homelessness. For example, “procuring an abortion” is one of only seven “crimes” for which the penalty is automatic excommunication. In 1983, the Catholic Church reduced from 37 to 7 the number of “crimes” for which a Catholic would be automatically excommunicated. *The*

that under the district court's opinion religious organizations should be barred from programs to feed the hungry and house the poor “merely because these advance religious objectives at the same time that they achieve the government's secular purpose.” *Id.* at 17. This analogy, however, fundamentally distorts the issues in this case. The proper analogy to the AFLA would be to a statute that funded sectarian groups to *teach and promote* their religious values on homelessness and hunger in the hopes that that indoctrination would help alleviate these social problems.⁷⁴

B. The AFLA Is Unconstitutional Because It Lacks Any Statutory Safeguards.

It is undisputed that numerous AFLA grantees, subgrantees and participants are, in fact, “religious” by virtue of their affiliation, sponsorship, and stated policies. Yet the statute imposes absolutely no restriction on the ability of these religious grantees to use federal funds to further their own religious missions. The AFLA lacks the constitutionally mandated guarantee that granted funds will be used only for “secular, neutral, or nonideological” purposes.⁷⁵ The AFLA

Code of Canon Law 19 (J. Coriden, et al., ed. 1985). While “procuring an abortion” is included, failing to do enough to help the poor clearly is not a basis for automatic excommunication. The seven include: (1) “apostasy, heresy, schism”; (2) “violation of the consecrated species”; (3) “physical attack on the pope”; (4) “absolution of an accomplice in a sin against the Sixth Commandment”; (5) “unauthorized ordination of a bishop”; (6) “direct violation by a confessor of the seal of confession”; and (7) “procuring an abortion.” J. Huels, *The Pastoral Companion* 135 (1986).

74 Moreover, religious groups could not be funded to provide services that lose their purely secular status when given in accordance with specific religious dictates.

75 Government aid to a religious institution may be permissible if the aid is inherently “secular, neutral, and nonideological” and any assistance to the sectarian enterprise is merely “indirect, remote, or incidental.” E.g., *Nyquist*, 413 U.S. at 771, 780. Into this category falls the loan of secular textbooks to parochial school students, *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (state-provided textbooks were secular and provided equally to all school children); payment for bus transportation for parochial school stu-

gives money, for example, to Catholic organizations to promote adoption over abortion but nothing in the Act prohibits Catholic grantees from doing so by teaching that an embryo is infused with a soul from the moment of conception. As held by the district court, this alone renders the AFLA program unconstitutional. J.S. App. 29a & n.13, 31a.

This Court has held that Congress may not give cash grants to any religious institution without ensuring by statute that the grant will be used solely for secular purposes:

In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Nyquist, 413 U.S. at 780; *see also Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479-80 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (plurality opinion). In *Tilton*, for example, this Court upheld federal construction grants to religious (but not "pervasively sectarian") colleges,⁷⁶ but only to the extent that grant restrictions prohibiting the use of buildings constructed with such funds for sectarian purposes remained effective; the Court declared invalid that part of the grant conditions that lifted such restrictions after twenty years.⁷⁷

dents, *Everson*, 330 U.S. 1 (bus transportation was provided for all school children); diagnostic testing of parochial students, *Wolman v. Walter*, 433 U.S. 229 (1977) (nonpublic school controlled neither the content nor results of subsidized tests and diagnostic testing was performed by public personnel); and therapeutic services provided for such students off-premises by public employees, *id.*

76 The Court in *Tilton* specifically found that religion did not "so permeate[] secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680 (plurality opinion).

77 403 U.S. at 682-84. *See also Roemer*, 426 U.S. at 759-67 (plurality opinion), in which the relevant statute had been amended after *Lemon* to ensure that state aid was extended only to secular activities. The Court's opinion makes clear that the absence of such a provision would have led to a different result in *Roemer*. *See especially id.* at 767 n.23.

Appellants, understandably, do not deny the absence of statutory safeguards in the AFLA.⁷⁸ They assert that a clause in the grant award letter suffices because it prohibits grantees from using the funds to "teach or promote religion." This clause, inserted in grant letters only after this litigation was instituted, is wholly inadequate to correct the numerous constitutional problems recognized by the court below.

In an open-ended program like the AFLA, a prohibition on the "teaching or promotion of religion" is inadequate to ensure that funds be used only for secular purposes.⁷⁹ Diversion of funds to sectarian ends may be accomplished in many ways other than explicit "teaching or promotion." "Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics" or in one on sexual education. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring). If "history can be given the gloss of a particular religion," so too can a course teaching specific sexuality values. *Id.* at 636.

Moreover, *Tilton*, 403 U.S. 672, insisted on statutory safeguards notwithstanding the fact that the Constitution demands the same result. The district court described the grant letter clause as "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agent fiat." J.S. App. 29a n.13. The court properly concluded that "[n]o case permits a court to find that such a discretionary

78 That the absence of such a guarantee was not mere inadvertence, curable through a flexible reading of the statute, is clear from the Act's language, which requires religious involvement, J.S. App. 28a, 29a n.13, its legislative history, and the Act's numerous other prohibitions and restrictions on eligibility. *See supra pp. 4-5.* By contrast, the statutes in *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Tilton*, 403 U.S. at 676-77; and *Roemer*, 426 U.S. at 740, were grant authorizations of a general nature, available to all accredited institutions on a noncompetitive basis, and restrictions on the funding of sectarian activities were in fact the primary statutory limitation on eligibility.

79 Though to go further would unconstitutionally entangle government and religion. *See infra pp. 45-53.*

statement adequately protects against sectarian use of public funds." *Id.*⁸⁰

Appellants' pale defense of the grant clause is most remarkable for its herculean effort to avoid the actual facts in this case. In an area of the law where even the *risk* of government-sponsored sectarian instruction is regarded as sufficient to warrant invalidation, the actual documentation of such activities by a substantial percentage of AFLA grantees speaks louder than any statutory exegesis. Whereas cases such as *Meek*, 41 U.S. 349, and *Grand Rapids*, 473 U.S. 373, involved no documented instances of religious indoctrination, repeated instances of religious indoctrination by AFLA grantees have been documented and are unrebutted. Of the 726 material facts submitted by the government in the district court, only four concerned monitoring and enforcement. No action taken ever investigated the degree of sectarianism of an institution, guaranteed the secular use of funds or recouped any of the tens of thousands of dollars of federal funds used to teach religion.⁸¹

Grantees, once funded, received no direction or supervision from HHS concerning regulating the religious content of the

80 The intervenor opines that the "AFLA grant conditions are similar to those attached to most federal grant projects," and then proceeds to cite three projects. Int. Br. 33-34. Those restrictions, however, were also located in a statute or regulation, making them quite unlike the Notice of Grant Award in this case. Intervenor is correct, however, in noting how common such *statutory* restrictions are in federal grant programs. See, e.g., 20 U.S.C. § 27 (Vocational Educational Act); 20 U.S.C. § 241-1 (a)(1)(B), (a)(4) (Elementary and Secondary Education Act of 1965); 20 U.S.C. §§ 1021(c), 1062(b)(1), 1069c(1), 1070e-1(c)(2)(A)(ii), 1132g-3(c)(2), 1132i(c), 1134e(g) (Higher Education Act of 1965); 20 U.S.C. § 1210 (Adult Education Act); 20 U.S.C. § 3862(c)(2) (Education Act of 1965); 42 U.S.C. § 2753(b)(2)(C) (Work-Study Program); 42 U.S.C. § 5001(a)(2) (Retired Senior Volunteer Program).

81 For example, HHS never sought to recoup the funds given to Catholic Charities of Arlington and to St. Margaret's even though both programs used their funds to teach Catholic doctrine on sexuality. In fact, after their 1984-85 funding cycle, when CCDA was not re-funded by HHS, the sole reason was the "failure to make its program accessible to the public generally." J.A. 784, 742.

programs. R. 112, 529-30; J.A. 178.⁸² OAPP grant conditions for 1982 and 1983 contained no restriction on religious use of AFLA money.⁸³ OAPP staff made site visits to AFLA classes in parochial schools and church parishes and received progress reports and continuation applications with statements or clippings submitted by grantees indicating extensive religious content and influence in funded programs. Nevertheless, the OAPP reports were devoid of any recognition or criticism of the evident constitutional implications of these facts. J.A. 170-71, 181, 184.⁸⁴

It is no coincidence therefore that during the AFLA's entire existence, the only steps ever taken by HHS to ensure secular use of federal funds came in direct response to information revealed in this lawsuit and failed even then to meet constitutional mandates. *See supra* pp. 11 n.22, 14 n.29, 17 n.38, 18-19 & n.40.

C. The AFLA Is Unconstitutional Because It Funds "Pervasively Sectarian" Organizations.

Direct cash grants to "pervasively sectarian" institutions are impermissible no matter how carefully limited or nonideological the activity. "[N]o state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755

82 Despite repeated inquiry from OAPP staff, Mecklenburg issued no guidelines on how staff should judge or review curriculums or materials that grantees were supposed to submit to OAPP. R. 97, 77-79; R. 112, 520-21.

83 Nor did the grantees receive direction on the abortion restrictions which some viewed as a religious issue. J.A. 123-25.

84 For example, Sheeran admitted that he did not preview curriculum or other materials R. 57, 147-49, 154. Rosengard admitted making a site visit for St. Margaret's to a parochial school to see one of the AFLA prevention programs. R. 74, 95-96. Rosengard, however, had no concerns about religious involvement until February 1984 when asked to investigate their religious curriculum. R. 74, 90-91. Similarly, both OAPP Director Mecklenburg and Rosengard made site visits to St. Ann's without ever expressing concern about the religious symbols present or the influence of Catholic doctrine on the program. R. 92, 38-40; R. 93, 26-29; R. 60, 49-50.

(plurality opinion) (citing *Hunt v. McNair*, 413 U.S. 734 (1973)); *see also Grand Rapids*, 473 U.S. at 392-93.⁸⁵

This Court has identified various factors by which to distinguish institutions that are "pervasively sectarian" (typically, parochial schools) from those that are not (typically, religiously affiliated colleges and universities). For example, does an atmosphere of "academic freedom" prevail, or are there religious restrictions on what may be taught? *Tilton*, 403 U.S. at 681-82. AFLA participants such as St. Margaret's,⁸⁶ St. Ann's, and Brigham Young University are plainly pervasively religious because of the comprehensive religious restrictions on what they may do and say. While the AFLA program purports to be "educational" in nature, the statutes, its administration and its grantees all reject "academic freedom." Counselors at St. Margaret's, for example, are not free to contradict Catholic teachings, nor are the adolescent conselees free to receive dissident views.⁸⁷

⁸⁵ In *Grand Rapids*, this Court noted that *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), permitting a subsidy for certain state-mandated testing services performed by nonpublic schools, was an exception to the general rule. 473 U.S. at 393. In *Regan*, "[t]he nonpublic school [had] no control whatsoever over the content of the tests" and there were "ample safeguards" against payments for sectarian services. 444 U.S. at 654, 659.

⁸⁶ St. Margaret's, an obstetrical and gynecological hospital, which received a total of \$1,879,118 from HHS, J.A. 754, must be considered pervasively sectarian under any criterion, because it has religious restrictions governing virtually all its reproductive health services and sexual education programs. J.A. 525-55.

⁸⁷ Kim Maisenbacher, a nurse in St. Margaret's AFLA program stated in an affidavit: "In my employment interview I was told . . . that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities" (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job." J.A. 550.

The district court found that certain AFLA grantees are "pervasively sectarian."⁸⁸ Appellants' assertion that the Court "did not consider whether the AFLA grantees (or any one of them, for that matter) are pervasively sectarian" is fatuous. Gov. Br. 45. The AFLA promotes religion in the three impermissible ways described by this Court in *Grand Rapids*:

First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government in the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

473 U.S. at 385.

⁸⁸ AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them. While the Court will not engage in an exhaustive recitation of the record, *references to representative portions of the record reveal the extent to which the AFLA has in fact "directly and immediately" advanced religion, funded "pervasively sectarian" institutions, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion.*

J.S. App. 33a (emphasis added). Subsequently, the court went on to say: "[T]he inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a. Finally, the district court stated:

In sum, the facts demonstrate beyond peradventure the effect of the Adolescent Family Life Act program. . . . In short, defendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for a "direct and immediate effect" of advancing religion, a benefit to a "pervasively sectarian" institution, or the use of tax dollars to "teach" religion.

Id. at 38a.

OAPP funded applications based on pre-existing religious programs using the same teachers and religious materials that ultimately appeared in the AFLA-sponsored curriculum. Clearly they *will* and *have* "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."⁸⁹ Second, the impermissible "symbolic link" exists in this case. AFLA staff referred to the program as a "joint effort[] between . . . churches and the Federal Government," AFLA grantees publicly stated that their religious beliefs were funded by the government, and AFLA programs were conducted in parochial school classrooms, with all the accoutrements of sectarian education. See *supra* pp. 13-19, 22-24; *infra* p. 48 n.96. This endorsement also occurs when a secular grantee uses religious material⁹⁰ or utilizes nonpaid religious consultants or participants.⁹¹ Cf. *Lynch v. Donnelly*, 465 U.S. 668, 691-94 (1984) (O'Connor, J., concurring). The constitutional difficulties with the government endorsement are magnified by the abortion-related restrictions on eligibility for AFLA grants which discriminate among religions.

Finally, the "impermissible subsidy of a primary religious mission"—the third criterion in *Grand Rapids*—is self-evident by virtue of the direct nature of the cash grant with no assurances of secular use.

The government's theory of pervasive sectarianism would require a remand for a factual finding of the degree of sectarianism for each and every AFLA grantee, subgrantee,

⁸⁹ As this Court said in *Meek v. Pittenger*, "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 371 (footnote omitted).

⁹⁰ For example, the University of South Carolina put on a play in public schools where they presented the views of "the church" as anti-abortion. J.A. 580.

⁹¹ The University of South Carolina organized a "Ministers Action Coalition" with their AFLA funds, and designated churches as "special target areas for community intervention." R. 181, Vincent Decl. ¶ 7; R. 155, A., IV, 420. The Memorial Public Hospital used "Christian Education Teachers" as teachers of workshops. R. 155, A., IV, 294-98.

and non-funded participant. It ignores the over 1,200 admitted facts on the 1982 and 1983 grantees, J.A. 619, and demands "unfortunately" that plaintiffs start discovery anew on the current sixty-two grantees. Gov. Br. 33 n.26. The five-year cap on AFLA grant awards means that under the government's theory, review by this Court could be indefinitely avoided. § 300z-4(c)(1). Such a requirement would discourage, if not foreclose, challenges to government action respecting an establishment of religion, which this Court has recognized are of fundamental importance. See *Flast v. Cohen*, 392 U.S. 83 (1968).

Further, this Court has never required such a detailed itemization. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975), *aff'g in part and rev'g in part*, 374 F. Supp. 639 (E.D. Pa. 1974) (three-judge court), this Court invalidated Pennsylvania's Acts 194 and 195 as impermissibly aiding "religion-pervasive institutions," though the district court had made no finding of "pervasively sectarian" as to any individual recipient, nor even as to the schools taken as a whole. In fact, not all the recipient schools in *Meek* were religious schools, and this Court could go no farther than to say that the "very purpose of *many of those schools* is to provide an integrated secular and religious education." 421 U.S. at 364, 366 (emphasis added).

Finally, the statute does not exclude pervasively sectarian institutions from being involved with AFLA programs, as grantees or otherwise, nor has OAPP ever attempted to do so. J.A. 71-72. Even the possibility that, under the terms of the Act, pervasively sectarian institutions could be AFLA participants would render the Act unconstitutional.

II. THE AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION.

The third prong of the *Lemon* test is designed to prevent government from being put in a relationship of supervising the internal working of religions. Considering the virtually open-ended AFLA programs, the district court correctly concluded, "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a.

AFLA programs require vastly more on-going oversight than the Title I programs for remedial aid invalidated solely on this point in *Aguilar v. Felton*, 473 U.S. 402 (1985).⁹² The statutory scheme in *Aguilar*, moreover, had seven safeguards not present in the AFLA: the teachers sent to parochial schools in *Aguilar* were under public control; remedial subjects were limited to math, English and reading; Title I services were available to all school children according to need; the teaching took place in "desanctified" classrooms; program instructional materials were the same as used in public schools; public school professionals were responsible for the selection of students; and Title I contained explicit statutory prohibitions against religious teaching. *Id.* at 406-07.

Excessive entanglement was found not only because of the "pervasively sectarian" atmosphere of the schools, but because assistance was "provided in the form of teachers [and] ongoing inspection is required to insure the absence of a religious message." *Id.* at 412. The Court also noted that the close "administrative cooperation" necessary to maintain the programs included judgments by the state "concern[sing] matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Id.* at 413, 414.⁹³

Although the government argues that entanglement concerns are "unwarranted" where institutions are not "pervasively sectarian," Gov. Br. 44, this Court has repeatedly held that the degree of sectarianism of an institution is to be considered "cumulatively" with the nature of the aid and the resulting relationship created between the state and the institution. *Roemer*, 426 U.S. at 766 (emphasis added); see also *Hunt*, 413 U.S. at 747.

⁹² In contrast to the AFLA, the Title I programs in *Aguilar* had been in effect for nineteen years with no evidence of religious indoctrination. 473 U.S. at 424 (O'Connor, J., dissenting).

⁹³ See also *Lemon v. Kurtzman*, 403 U.S. at 619; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982); *Larson v. Valente*, 456 U.S. 228, 253 (1982); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. at 370.

A. The Degree Of Sectarianism Of An Institution Must Be Assessed In Light Of Its Religious Tenets Governing The Aid At Issue.

The government argues that the hospitals and maternity homes providing AFLA services are so "fully capable" of discharging services in a secular manner that ordinary monitoring is sufficient. Gov. Br. 21, 28, 44. This ignores the uncontested record, which demonstrates "beyond peradventure" that funds went to religious institutions "for purposes indistinguishable from their religious aims." J.S. App. 38a.⁹⁴ The relevant inquiry for assessing the constitutionality of funding sex education or the provision of reproductive health services in a religious context is whether there are religious restrictions on these activities, not what percentage of the total hospital services they comprise.⁹⁵

The age of the audience and location of the programs are two additional factors in assessing the nature of an institution. This Court has found that college students are "less susceptible to religious indoctrination," so there is less need for surveillance. *Tilton*, 403 U.S. at 686-87. In contrast, some AFLA

⁹⁴ The AFLA grant to the St. Ann's maternity home was used to double the number of teachers working under religious directives at the on-site high school whose principal reported to the Daughters of Charity. J.A. 305; R. 93, 53. St. Margaret's had a maternity home and school on its premises, St. Mary's, which used AFLA-funded social workers working under religious directives. R. 228, 6-7, 11-14. The teenagers attending the school were taught segments of the Family Life Course which were tailored to religious beliefs. R. 229, 58; R. 231, 110-11. The religious directives imposed on Catholic hospitals affected the care and counseling of all patients including teenagers in AFLA programs. J.A. 525-55.

⁹⁵ Although the intervenor expresses concern that a Wisconsin program similar to the AFLA would be "directly affect[ed]" by an affirmance in this case, Int. Br. 6 n.4., it neglects to point out that Wisconsin has addressed the problem of unconstitutional religious involvement in its program by issuing provisional regulations that define an organization as "pervasively sectarian" and ineligible for funds if *any* one of seven criterion apply, including the following:

5. The referral, counseling and/or teaching activities of the applicant are restricted to the religious doctrine of that organization;
6. The applicant has a statement prohibiting certain activities due to religious doctrine[.]

See Appendix C to brief.

programs have started as early as first grade, and the majority of programs are for teenagers, some of whom are pregnant and vulnerable. J.A. 551. Further, AFLA programs often take place in sectarian settings with religious symbols throughout. J.S. App. 36a.⁹⁶

B. The Nature Of The Aid Provided Under AFLA Grants Requires Close And Entangling Supervision.

The district court found that the AFLA contemplates “one-on-one” counseling and “teaching by grant recipients and subcontractors” on subjects that are inseparable from religious dogma. J.S. App. 28a, 40a, 43a (emphasis in original).

Each program under the AFLA is under the control of grantees.⁹⁷ The programs all develop their own material, curriculum, counseling techniques, bibliographies, and guidelines. AFLA funds are used to pay for teachers, counselors and facilitators, including the salaries and training of religious personnel.⁹⁸ Even grantees who are funded for care grants include educational components. For example, St. Ann's care

96 This is true of both religious and secular grantees. For example, St. Margaret's Hospital has religious statues and symbols throughout, including in delivery rooms and some examining rooms. J.A. 531; Lyon County Health Department held classes at several churches and parochial schools, such as Sacred Heart Parochial School where religious symbols were on the walls, R. 155, A., IV, 238; and Tucson Unified School District subcontracted with, among others, St. Elizabeth of Hungary Clinic and Catholic Social Services, which have religious symbols such as crucifixes and/or pictures of St. Elizabeth visible in their waiting rooms and lobbies, *id.* 281-84.

97 The United States argued before this Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), that:

The correct line [for avoiding entanglement violations], we believe, is to permit federal aid to go on an evenhanded basis to all students as long as the provision of services is strictly supplemental and totally in the control of public authorities. . . . And the vice of excessive entanglement is avoided so long as there is no mixture or overlap of jurisdictions.

See Government's brief at 47 (emphasis added).

98 Federal tax monies are used to employ religious personnel at St. Margaret's and St. Ann's and to employ personnel who did work indistinguishable from other employees working at the religious institution. R. 155, A., II, 57-59; R. 155, A., III-A, 467-70, 508, 547; R. 155, A., VI, 236-37; see also R. 155, A., III, 37-38, 79, 81-84; R. 155, A., IV, 23-26.

project requires Family Life Education classes, and Cities in Schools provides adolescents with educational services supported by Here's Life Washington, a religious organization which provides “[i]ndividual counseling based on Scriptural principles.” J.A. 572; R. 155, A., IV, 316-17, 321-26. Moreover, entanglement occurs not only between HHS and various grantees, but between those grantees that are state or local governments and their religious participants.⁹⁹

This Court in *Lemon* examined the “potential for involving some aspect of faith or morals in secular subjects,” 403 U.S. at 617, differentiating between the degree of supervision necessary with teachers as opposed to textbooks. Unlike the one-time construction grants upheld in *Tilton* as inherently nonideological in character, 403 U.S. at 687, the AFLA programs are designed to teach morals. The danger of religious indoctrination under the AFLA is therefore present in both the teaching materials and the teachers.¹⁰⁰

Reviewing a Catholic grantee's teachings on contraception more clearly involves invading the “precinct of the church” than reviewing a secular math book. The monitoring necessary to “be certain” religious indoctrination does not creep into AFLA programs cannot be compared with an annual assessment of the amount of college fees, *Hunt v. McNair*, 413 U.S. 734 (1973), or the “quick and non-judgmental” annual audits of state funds required in *Roemer*, 426 U.S. at 743. As the district court stated, ensuring that religion is not promoted

99 For example, grantee Camden County Department of Health subcontracted with one group to build on its “linkages with several Catholic parishes” and on previous work presenting sex education programs in Catholic churches as well as public high schools. R. 155, A., IV, 185-86. Another subgrantee would provide an educational program based on one developed with the Family Life Bureau of the Diocese of Camden. *Id.* at 187, 187A-187C.

100 The Court, in *Meek v. Pittenger*, was alert to the fact that “the likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient” 421 U.S. at 370-71; see also *Wolman v. Walter*, 433 U.S. 229, 244 (1977), where this Court found a different degree of danger because “diagnostic services, unlike teaching or counseling, have little or no educational content.”

"would require extensive and continuous monitoring and direct oversight of every counseling session." J.S. App. 42.

C. The AFLA Compromises The Integrity Of Both Government And Religion.

The First Amendment's requirement of a separation of Church and State is intended both to protect religion from being corrupted by the state and vice versa. *See generally* M. Howe, *The Garden and the Wilderness* (1967).¹⁰¹ In *Lemon*, the Court saw inherent difficulties in the "possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." 403 U.S. at 619. In this instance, HHS alleges that they are enforcing a grant condition ensuring that grantees do not "teach or promote" religion. J.A. 757. There is clearly disagreement about what constitutes "promoting" religion.¹⁰² For example, is teaching a teenager that there are "no severe psychiatric consequences from carrying a pregnancy to term due to rape," J.A. 426, merely an accidental factual error or a deliberate attempt to promote a religious tenet against abortion? Another example occurred when a nurse midwife working in St. Margaret's AFLA program was reprimanded for contravening the hospital's religious views on sex when she answered "yes" to a teenager who asked whether she could have sex during pregnancy. J.A. 552.

¹⁰¹ See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. at 775 (Stevens, J., dissenting) (remarking on "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it").

¹⁰² Sex education curriculums by grantee St. Margaret's were governed by the rules of the Boston Archdiocese that required them to be "based on Catholic teaching." J.A. 608. *See* J.A. 423-24; *supra* p. 18 nn.39, 40. Its curriculums claim that natural family planning is highly effective and has no side effects, but provide only abbreviated discussion of all other methods of contraception, listing numerous complications or side-effects while failing to mention the infrequency of their occurrence. *See* R. 155, A., II, 308-19; J.A. 422-26. Dr. Laz evaluated the curriculum and concluded that the "sections on family planning and abortion are biased, misleading, and contain many medical inaccuracies. . . . The curriculum is clearly designed to promote Catholic doctrine. . . ." J.A. 531-39. St. Ann's curriculum is not based on medicine either, but on doctrine. *See* J.A. 342-43, 350-53.

Several of the religiously affiliated grantees did attempt to remove some explicit religious content from their programs. For example, shortly after Search Institute received its grant notice, Rev. Forliti sent OAPP's deputy director a copy of an explicitly religious curriculum, which was returned without comment. Prior to depositions, however, Rev. Forliti's explicit references to religion and churches were deleted. R. 125, 119-25.¹⁰³ In some cases changes created internal religious dissension.¹⁰⁴

D. The AFLA Creates Political Divisiveness.

Even if political divisiveness is seen as no more than "evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion," *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J. concurring), the AFLA has created such divisiveness.¹⁰⁵ The district court held that the AFLA would, for two reasons, "tend to incite political division along religious lines." First, the issues involved are central to religious doctrine and ones on which "religions' fundamental beliefs differ." *See supra* pp. 24-28, 35-37. Second, annual appropriations in this competitive grant scheme assure ongoing controversy and conflict.

¹⁰³ Some grantees did apparently change their religious orientation in the belief this would help retain their AFLA funds. On September 17, 1984, Dr. James Dittes, a theology professor and advisory board member of AFLA grantee, Search Institute, affirmed that the Institute was religious. J.A. 556-58. After the trial court order, on May 8, 1987, Dr. Dittes asked that Search be reclassified as secular because of "major and sweeping changes in the organization." J.A. 624-25.

¹⁰⁴ The Catholic newspaper *The Wanderer* published an article raising concerns about the propriety of Catholic Charities funds being used, together with AFLA funds, in a program that includes teaching about contraception "and will not teach nor promote religion." Potter, "Arlington Bishop Stonewalls on Propriety of Sex-Ed Course," *The Wanderer* (Apr. 11, 1985).

¹⁰⁵ *See Meek*, 421 U.S. at 370-73; *Lemon*, 403 U.S. at 622-24; and *Nyquist*, 413 U.S. at 796-99. The Seventh Circuit invalidated a program of subgranting federal CETA workers to parochial schools because of the political divisiveness created by a competitive scheme similar to AFLA. *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980).

The fact that relatively few groups receive benefits under a government funded program¹⁰⁶ was identified as a warning signal of political divisiveness in *Lemon*, 403 U.S. at 623. The aid programs upheld by this Court, in contrast to the AFLA, involved fairly automatic, non-competitive grants either to both public and private entities, all school children or parents. See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983); *Roemer*, 426 U.S. 736. See also *Walz*, 397 U.S. 664 (tax exemption available across the board). AFLA funding decisions are made by the director of OAPP, whose decisions are only guided by scores given by readers.¹⁰⁷ Because secular grant applicants must show how they involve religious groups, they must compete for religious support and religions are given the power to influence who gets the federal grants.¹⁰⁸ Secular groups compete with religious groups, and certain religious groups are advantaged over others. As shown by the treatment of the University of Arkansas, *see supra* p. 31, the grant-making scheme "foster[s] the creation of political constituencies defined along religious lines." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Furthermore, AFLA grants gave grantees political influence. The AFLA grant to St. Margaret's to build its religious curriculum enabled St. Margaret's to gain a foothold with the Boston public school board to develop sex education programs

¹⁰⁶ Except for a small number of national projects, HHS had a two-per-state limit, and in fact in 1983 invited applications from the fifteen states without grantees. 48 Fed. Reg. 2917 (1983).

¹⁰⁷ See 47 Fed. Reg. 8685 (1982). Ideological considerations influenced AFLA funding decisions. Sheeran, OAPP Program Officer for care and prevention grants, and Dr. Patricia Thompson, Program Officer for the AFLA research grants, both testified that Director Mecklenburg separately read them a list of organizations, including the American Bar Association, which "should not be funded by this [the Reagan] Administration." J.A. 118-19. Thompson was ordered to find a reason to avoid funding the Urban Institute, which received the second highest research score, for this reason. R. 108, 50-52.

¹⁰⁸ For example, the OAPP explained to one applicant that it was rejected in part because "the lack of support from the Toledo Area Council of Churches weakened the proposal." R. 155, A., I-A, 505H.

for public schools. R. 185, Supp. A., 18, 23, 35-37.¹⁰⁹ The Charles Henderson Child Health Center used AFLA funds to lobby both the City of Troy and the Alabama House of Representatives to issue proclamations on Christianity and the family. R. 155, A., IV, 406-07.

In sum, AFLA participants' "standing in the political community" increased and the standing of others, such as the religious plaintiffs, diminished. *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

III. APPELLANTS' ALTERNATIVE THEORIES CANNOT OBSCURE THE FACT THAT THE AFLA ADVANCES RELIGION AND FOSTERS EXCESSIVE ENTANGLEMENT.

Appellants devise a variety of novel standards for constitutionality under the Establishment Clause, all designed to test aid programs that are not even before the Court. These approaches are as disturbing in their disregard of prior case law as in their disregard of the facts of this case.

A. Labeling The AFLA A "Social Welfare Program" Does Not Exempt It From Scrutiny Under The Establishment Clause.

Appellants persistently avoid the actual facts of this case and seek instead to litigate the validity of other, very different, hypothetical programs. The Establishment Clause and this Court's prior cases provide limiting principles, an answer to appellants' parade of horribles. The *Lemon* test clearly recognizes that teaching a sex education program is constitutionally different than the distribution of surplus food or sheltering the homeless.

The very term "social welfare" as used by appellants is misleading. Just what activities this phrase is meant to describe remains a mystery. Schools, including parochial schools, provide not only education as such, but also social services for

¹⁰⁹ Funding also helped grantees to become self sustaining once funding stopped. St. Margaret's, for example, charged parochial but not public schools for its AFLA programs. R. 231, 191-92. "Enclosed is a check for \$250.00 . . . through the kindness of our Pastor Reverend F.X. Turke." J.A. 427.

their students. Appellants seek to create a sharp constitutional dividing line between such schools and institutions providing "social welfare services," but this line does not exist: the AFLA, for example, funds education, sometimes in parochial schools.¹¹⁰ See *supra* pp. 9-19.

Moreover, these limiting principles do not prevent religious groups from operating freely in the realms that the First Amendment sought to leave intact: individual conscience, advocacy and activity. This case does not affect the right of religious institutions to perform social welfare functions or engage in good works. It concerns only the constitutionality of government subsidization of the religious enterprise. The phrase "social welfare" cannot be made a constitutional talisman when it ignores the fundamental reality behind the phrase.

The appellants insist that this case is governed by the 1899 case of *Bradfield v. Roberts*, 175 U.S. 291 (1899). In *Bradfield*, the Board of Commissioners of the District of Columbia had made, out of general funds appropriated by Congress, a \$30,000 construction grant to a Catholic hospital that had been issued a charter of incorporation by Congress in 1864. This Court saw no Establishment Clause problem in *Bradfield* because the special, limited privilege of the corporate charter was read to ensure that the hospital was not a "sectarian" institution. *Bradfield's* emphasis on "corporate powers," later termed "highly artificial" by one Justice, is itself of dubious contemporary authority. *Everson v. Board of Educ.*, 330 U.S. 1, 43 n.35 (1947) (Rutledge, J., dissenting). This nineteenth century charter in no way resembles the boilerplate language and routine process of contemporary charters of incorporation. Moreover, there is nothing in *Bradfield* to indicate that

¹¹⁰ The cases cited by the government, Gov. Br. 17, by no means support the proposition that there is a "historic partnership" of government and religious institutions. Cf. *Marsh v. Chambers*, 463 U.S. 783 (1983). All but two of the nine cases cited were decided on narrow state constitutional grounds. *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967), treated the state funding as payment to the child, not the institution, and cites *Everson* with no discussion. *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974), and *Wilder v. Bernstein*, 645 F. Supp. 1291 (S.D.N.Y. 1986), cited by intervenors, Int. Br. 33, raise the free exercise rights of children in the context of foster care where the state is acting *in loco parentis*, *id.* at 1335, an issue not present here.

the grant would have been upheld if the hospital had been merely a private institution without corporate personality. And surely the religious grantees under AFLA are not merely "nonsectarian and secular corporation[s]."

But there is a more fundamental reason why *Bradfield* is different from this case, a reason explained by an apt concurring opinion in *Lemon* itself:

The government may, of course, finance a hospital though it is run by a religious order, provided it is open to people of all races and creeds. [*Bradfield*] . . . The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran its hospital were Catholics, Methodists, agnostics, or whatnot. *For the hospital is not indulging in religious instruction or guidance or indoctrination.*

403 U.S. at 633 (Douglas, J., concurring) (emphasis added). The plaintiff's meagre allegations in *Bradfield* certainly did nothing to establish that the hospital was performing sectarian acts¹¹¹ or that it was "pervasively sectarian." The teaching, counseling and treatment of reproductive health matters under rigid religious dictates as subsidized by the AFLA, see *supra* pp. 19-22, are not comparable to a hospital constructing a diphtheria ward as Providence hospital was funded to do in 1899. *Government of the District of Columbia Annual Reports of the Commissioners*, 1874-1941, Report of Board of Health (1896, 1897).¹¹²

¹¹¹ There is no small irony that appellants seek to find authority in *Bradfield*. The hospital whose grant was upheld in *Bradfield*, Providence Hospital, is the same Providence Hospital whose "Center for Life" program funded by AFLA is one of the most blatant examples of AFLA funds impermissibly advancing religion. J.S. App. 34a.

¹¹² In eighty-eight years, this Court has cited *Bradfield* in only thirteen cases—only six times in majority or plurality opinions interpreting the Establishment Clause—and never for any assertion more specific than that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." *Hunt*, 413 U.S. at 743; see also *Mueller*, 463 U.S. at 393; *Roemer*, 426 U.S. at 746; *Tilton*, 403 U.S. at 679.

B. AFLA Funding Of Religious Institutions And Religious Activities Is Not Neutral.

The intervenor asserts that the proper inquiry under the Establishment Clause is, or should be, "neutrality." However alluring in the abstract, the term "neutrality" does not by itself express the goal of the Establishment Clause, nor has it determined this Court's analysis in prior cases. From the criminal law to expenditures for the public welfare, public policy is predicated on distinctions—on departures from a strict "neutrality"—and the First Amendment throws the weight of the Constitution behind one such distinction: Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions.¹¹³

The intervenor quotes this Court's words in *Roemer*—"Neutrality is what is required. The state must confine itself to secular objectives, and neither advance nor impede religious activity"—but omits conveniently the words immediately following:

Of course, that principle is more easily stated than applied. The Court has taken the view that *a secular purpose and a facial neutrality may not be enough, if in fact the state is lending direct support to a religious activity*. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, *and even though it makes its aid available to secular and religious institutions alike*.

426 U.S. at 747 (plurality opinion) (emphasis added). This, and not mere "neutrality," is the crux of the matter.

¹¹³ There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. *That is a difference which the Constitution sets up between religion and almost every other subject of legislation, a difference which goes to the very root of religious freedom.* . . .

Everson, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added).

The intervenor's emphasis on equality in the receipt of material benefits,¹¹⁴ which seems to regard religious institutions as mere economic competitors for government concessions, is a peculiar reading of the Establishment Clause. But the invocation of "neutrality" loses all force when one considers that the AFLA is decidedly *non-neutral* in at least four ways. First, by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations. Second, the AFLA is a competitive grant program, unlike the education cases in which aid was available to either all accredited institutions, all school children, or all nonpublic schools. Third, only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding.¹¹⁵ Finally, perhaps most importantly, AFLA is non-neutral in the sense that the ultimate beneficiaries, the targeted adolescents, are presented with government-sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescents. See *supra* pp. 9-22, 26-28; *Edwards v. Aguillard*, 96 L.Ed.2d 510 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

IV. THE ENTIRE AFLA MUST FALL DUE TO THE UNCONSTITUTIONAL RELIGIOUS INVOLVEMENT, AND THE STATUTE MAY NOT BE SEVERED.¹¹⁶

This Court has held that the relevant inquiry in deciding

¹¹⁴ The intervenor argues that the district court's judgment denies it the free exercise of religion by denying its members access to government-funded sex education consistent with their religious beliefs. Int. Br. 7. There is, however, no free exercise right to a government subsidy for religious education, *Nyquist*, 413 U.S. at 782 n.38. Moreover, even if this Court were to recognize the free exercise right asserted by intervenor, it would have to weigh that claim against the free exercise rights of all those, including patients in Catholic hospitals governed by *Religious Directives*, who were compelled to follow these *Directives* as a condition for participating in a government program. J.A. 541. See *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).

¹¹⁵ This Court has stated, "[t]he clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

¹¹⁶ This cross-appeal is joined by all plaintiffs except the American Jewish Congress.

whether or not to sever an unconstitutional provision from a statute is *not* whether the statute could continue to operate absent the invalid provision, but is "whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines v. Brock*, 107 S. Ct. 1476, 1480-81 (1987) (emphasis in original);¹¹⁷ see also *City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987). This Court has also stated that when the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency, the Act will stand . . ." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); accord *Field v. Clark*, 143 U.S. 649, 695-96 (1892); see also *Hill v. Wallace*, 259 U.S. 44, 70-72 (1922). The AFLA clearly does not meet these requirements for severability.

A primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values. See *supra* pp. 2-4. One of the few principal differences between the AFLA and Title VI is that the AFLA repeatedly lists religious groups as specifically desired participants. Congress added references to religious organizations at four places throughout the AFLA, making religious organizations eligible for direct AFLA grants and requiring *all* grantees to involve religious organizations in their

¹¹⁷ *Alaska Airlines* is the only case on which the district court relied in severing the AFLA. In *Alaska Airlines*, this Court considered whether an unconstitutional legislative veto provision could be severed from the Airline Deregulation Act. The Court severed the legislative veto, noting it was by "its very nature . . . separate from the operation of the substantive provisions of a statute," 107 S. Ct. at 1480, and covered only "insignificant" aspects of the Act, *id.* at 1482. By contrast, the Court described the Act itself as a "major change" and "fundamental redirection" in the regulation of air transportation. *Id.* at 1478.

The AFLA is factually distinguishable from the Act in *Alaska Airlines* on all of these points. The inclusion of religious organizations is interwoven throughout the AFLA, is mandated in all funded programs and was a primary reason that Congress enacted the AFLA to replace Title VI. Also, the AFLA is a small experimental program, one of approximately forty-three federal programs, guarantees or protections designed to help pregnant adolescents and their families. See Moore, *Adolescent Parents: Federal Programs and Policies* (Summer 1983).

programs. Thus, Congress clearly viewed the participation of religious organizations as vital to the success of AFLA programs and would not have replaced Title VI absent the religious involvement.¹¹⁸

Moreover, to the extent that the legislative intent is unclear, this Court has ruled that "if the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall." *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909).

Courts also consider how the statute has actually operated to infer legislative intent. See *Meek v. Pittenger*, 421 U.S. at 363-65; *Sloan v. Lemon*, 413 U.S. 825, 830 (1973). The extensive involvement of religious organizations and promotion of religious beliefs in AFLA programs further demonstrate the inseparability of the religious sections in the statute. See *supra* pp. 6-24. Furthermore, because the AFLA has been unconstitutionally promoting religion for over six years, the surveillance needed to prevent the government promotion of religion under a severed AFLA would itself create unconstitutional "excessive and enduring entanglement." *Lemon*, 403 U.S. at 619.

Finally, the district court not only improperly severed language appearing throughout the statute,¹¹⁹ but also in effect wrote into the Act an injunction prohibiting funding of religious organizations. J.S. App. 48a. As this Court explained in *Hill v. Wallace*, it is beyond the scope of judicial duty to ensure severability by "dissect[ing] an unconstitutional measure and refram[ing] a valid one . . . by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court." 259 U.S. at 70.

¹¹⁸ The absence of both a severability clause and assurances that funds must be used only for secular purposes further indicates that Congress intended religion to be an inseparable part of the AFLA.

¹¹⁹ The district court ordered the cessation of the participation of religious organizations in the AFLA that was occurring at the time of the order. Contrary to the government's assertion, the court did not rest the order on the premise that all religious organizations are the same. Gov. Br. 31. Rather the court properly put the burden on the government to decide what is and what is not religious, as it is obliged to do in other regulatory contexts. R. 303, 35-38.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

Respectfully submitted,

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APPENDIX

EXHIBIT A**SUBCHAPTER XX—ADOLESCENT FAMILY LIFE
DEMONSTRATION PROJECTS****300z. Findings and purposes**

a) The Congress finds that—

(1) In 1978, an estimated one million one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock;

(2) adolescents aged seventeen and younger accounted for more than one-half of the out of wedlock births to teenagers;

(3) in a high proportion of cases, the pregnant adolescent is herself the product of an unmarried parenthood during adolescence and is continuing the pattern in her own lifestyle;

(4) it is estimated that approximately 80 per centum of unmarried teenagers who carry their pregnancies to term live with their families before and during their pregnancy and remain with their families after the birth of the child;

(5) pregnancy and childbirth among unmarried adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;

(6)(A) adoption is a positive option for unmarried pregnant adolescents who are unwilling or unable to care for their children since adoption is a means of providing permanent families for such children from available approved couples who are unable or have difficulty in conceiving or carrying children of their own to term; and

(B) at present, only 4 per centum of unmarried pregnant adolescents who carry their babies to term enter into an adoption plan or arrange for their babies to be cared for by relatives or friends;

(7) an unmarried adolescent who becomes pregnant once is likely to experience recurrent pregnancies and childbearing, with increased risks;

(8)(A) the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and are frequently associated with or are a cause of other troublesome situations in the family; and

(B) such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(9) a wide array of educational, health, and supportive services are not available to adolescents with such problems or to their families, or when available frequently are fragmented and thus are of limited effectiveness in discouraging adolescent premarital sexual relations and the consequences of such relations;

(10)(A) prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties, and since the family is the basic social unit in which the values and attitudes of adolescents concerning sexuality and pregnancy are formed, programs designed to deal with issues

of sexuality and pregnancy will be successful to the extent that such programs encourage and sustain the role of the family in dealing with adolescent sexual activity and adolescent pregnancy;

(B) Federal policy therefore should encourage the development of appropriate health, educational, and social services where such services are now lacking or inadequate, and the better coordination of existing services where they are available; and

(C) services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations; and

(11)(A) there has been limited research concerning the societal causes and consequences of adolescent pregnancy;

(B) there is limited knowledge concerning which means of intervention are effective in mediating or eliminating adolescent premarital sexual relations and adolescent pregnancy; and

(C) it is necessary to expand and strengthen such knowledge in order to develop an array of approaches to solving the problems of adolescent premarital sexual relations and adolescent pregnancy in both urban and rural settings.

(b) Therefore, the purposes of this subchapter are—

(1) to find effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family

members, and to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;

(2) to promote adoption as an alternative for adolescent parents;

(3) to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents, with primary emphasis on unmarried adolescents who are seventeen years of age or under, and for adolescent parents, which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs in order to—

(A) enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life; and

(B) assist families of adolescents to understand and resolve the societal causes which are associated with adolescent pregnancy;

(4) to encourage and support research projects and demonstration projects concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing;

(5) to support evaluative research to identify effective services which alleviate, eliminate, or resolve any negative consequences of adolescent premarital sexual relations and adolescent childbearing for the parents, the child, and their families; and

(6) to encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood.

(July 1, 1944, c. 373, Title XX, § 2001, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 578.)

§ 300z-1. Definitions; regulations applicable

(a) For the purposes of this subchapter the term—

(1) "Secretary" means the Secretary of Health and Human Services;

(2) "eligible person" means—

(A) with regard to the provision of care services, a pregnant adolescent, an adolescent parent, or the family of a pregnant adolescent or an adolescent parent; or

(B) with regard to the provision of prevention services and referral to such other services which may be appropriate, a non-pregnant adolescent;

(3) "eligible grant recipient" means a public or non-profit private organization or agency which demonstrates, to the satisfaction of the Secretary—

(A) in the case of an organization which will provide care services, the capability of providing all core services in a single setting or the capability of creating a network through which all core services would be provided; or

(B) in the case of an organization which will provide prevention services, the capability of providing such services;

(4) "necessary services" means services which may be provided by grantees which are—

(A) pregnancy testing and maternity counseling;

(B) adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption

agencies in the community if the eligible grant recipient is not a licensed adoption agency;

(C) primary and preventive health services including prenatal and postnatal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including—

(i) information about adoption;

(ii) education on the responsibilities of sexuality and parenting;

(iii) the development of material to support the role of parents as the provider of sex education; and

(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(H) appropriate educational and vocational services and referral to such services;

(I) referral to licensed residential care or maternity home services; and

(J) mental health services and referral to mental health services and to other appropriate physical health services;

(K) child care sufficient to enable the adolescent parent to continue education or to enter into employment;

(L) consumer education and homemaking;

(M) counseling for the immediate and extended family members of the eligible person;

(N) transportation;

(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(P) family planning services; and

(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(5) "core services" means those services which shall be provided by a grantee, as determined by the Secretary by regulation;

(6) "supplemental services" means those services which may be provided by a grantee, as determined by the Secretary by regulation;

(7) "care services" means necessary services for the provision of care to pregnant adolescents and adolescent parents and includes all core services with respect to the provision of such care prescribed by the Secretary by regulation;

(8) "prevention services" means necessary services to prevent adolescent sexual relations, including the services described in subparagraphs (A), (D), (E), (G), (H), (M), (N), (O), and (Q) of paragraph (4);

(9) "adolescent" means an individual under the age of nineteen; and

(10) "unemancipated minor" means a minor who is subject to the control, authority, and supervision of his or her parents or guardians, as determined under State law.

(b) Until such time as the Secretary promulgates regulations pursuant to the second sentence of this subsection, the Secretary shall use the regulations promulgated under Title VI of the Health Services and Centers Amendments of 1978 which were in effect on August 13, 1981, to determine which necessary services are core services for purposes of this subchapter. The Secretary may promulgate regulations to determine which necessary services are core services for purposes of this subchapter based upon an evaluation of and information concerning which necessary services are essential to carry out the purposes of this subchapter and taking into account (1) factors such as whether services are to be provided in urban or rural areas, the ethnic groups to be served, and the nature of the populations to be served, and (2) the results of the evaluations required under section 300z-5(b) of this title. The Secretary may from time to time revise such regulations.

(July 1, 1944, c. 373, Title XX, § 2002, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 580.)

§ 300z-2. Demonstration projects; grant authorization, etc.

(a) The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. Demonstration projects shall, as appropriate, provide, supplement, or improve the quality of such services. Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.

(b) Grants under this subchapter for demonstration projects may be for the provision of—

- (1) care services;
- (2) prevention services; or
- (3) a combination of care services and prevention services.

(July 1, 1944, c. 373, Title XX, § 2003, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 582.)

§ 300z-3. Uses of grants for demonstration projects for services

COVERED PROJECTS

(a) Except as provided in subsection (b) of this section, funds provided for demonstration projects for services under this subchapter may be used by grantees only to—

- (1) provide to eligible persons—
 - (A) care services;
 - (B) prevention services; or
 - (C) care and prevention services (in the case of a grantee who is providing a combination of care and prevention services);
- (2) coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons in furtherance of the purposes of this subchapter;
- (3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent premarital sexual relations and adolescent pregnancy;
- (4) plan for the administration and coordination of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents which will further the objectives of this subchapter; and

(5) fulfill assurances required for grant approval by section 300z-5 of this title.

FAMILY PLANNING SERVICES; AVAILABILITY IN COMMUNITY

(b)(1) No funds provided for a demonstration project for services under this subchapter may be used for the provision of family planning services (other than counseling and referral services) to adolescents unless appropriate family planning services are not otherwise available in the community.

(2) Any grantee who receives funds for a demonstration project for services under this subchapter and who, after determining under paragraph (1) that appropriate family planning services are not otherwise available in the community, provides family planning services (other than counseling and referral services) to adolescents may only use funds provided under this subchapter for such family planning services if all funds received by such grantee from all other sources to support such family planning services are insufficient to support such family planning services.

FEES FOR SERVICES: CRITERIA

(c) Grantees who receive funds for a demonstration project for services under this subchapter shall charge fees for services pursuant to a fee schedule approved by the Secretary as a part of the application described in section 300z-5 of this title which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. A grantee who receives funds for a demonstration project for services under this subchapter may not, in any case, discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services, except that in determining the ability of an unemancipated minor to provide payment for services, the income of the family of an unemancipated minor shall be considered in determining the ability of such minor to make such payments unless the parents or

guardians of the unemancipated minor refuse to make such payments.

(July 1, 1944, c. 373, Title XX, § 2004, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 583.)

§ 300z-4. Grants for demonstration projects for services

PRIORITIES

(a) In approving applications for grants for demonstration projects for services under this subchapter, the Secretary shall give priority to applicants who—

- (1) serve an area where there is a high incidence of adolescent pregnancy;
- (2) serve an area with a high proportion of low-income families and where the availability of programs of care for pregnant adolescents and adolescent parents is low;
- (3) show evidence—

(A) in the case of an applicant who will provide care services, of having the ability to bring together a wide range of needed core services and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for pregnant adolescents or adolescent parents; or

(B) in the case of an applicant who will provide prevention services, of having the ability to provide prevention services for adolescents and their families which are appropriate for the target population and the geographic area to be served, including the special needs of rural areas;

- (4) will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood

and primary health care centers, maternity homes which provide or can be equipped to provide services to pregnant adolescents, agencies serving families, youth, and children with established programs of service to pregnant adolescents and vulnerable families, licensed adoption agencies, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the demonstration project non-Federal funds, personnel, and facilities;

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the demonstration project; and

(8) will demonstrate innovative and effective approaches in addressing the problems of adolescent pre-marital sexual relations, pregnancy, or parenthood, including approaches to provide pregnant adolescents with adequate information about adoption.

FACTORS TO BE CONSIDERED IN MAKING GRANTS; SPECIAL NEEDS OF RURAL AREAS

(b)(1) The amount of a grant for a demonstration project for services under this subchapter shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents in such area.

(2) In making grants for demonstration projects for services under this subchapter, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds taking into consideration the relative number of adolescents in such areas in need of such services.

DURATION: FEDERAL SHARE

(c)(1) A grantee may not receive funds for a demonstration project for services under this subchapter for a period in excess of 5 years.

(2)(A) Subject to paragraph (3), a grant for a demonstration project for services under this subchapter may not exceed—

(i) 70 per centum of the costs of the project for the first and second years of the project;

(ii) 60 per centum of such costs for the third year of the project;

(iii) 50 per centum of such costs for the fourth year of the project; and

(iv) 40 per centum of such costs for the fifth year of the project.

(B) Non-Federal contributions required by subparagraph (A) may be in cash or in kind, fairly evaluated, including plant, equipment, or services.

(3) The Secretary may waive the limitation specified in paragraph (2)(A) for any year in accordance with criteria established by regulation.

(July 1, 1944, c. 373, Title XX, § 2005, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 584.)

§ 300z-5. Requirements for applications

FORM, CONTENT, AND ASSURANCES

(a) An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—

(1) an identification of the incidence of adolescent pregnancy and related problems;

(2) a description of the economic conditions and income levels in the geographic area to be served;

(3) a description of existing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents (including adoption services), and including where, how, by whom, and to which population groups such services are provided, and the extent to which they are coordinated in the geographic area to be served;

(4) a description of the major unmet needs for services for adolescents at risk of initial or recurrent pregnancies and an estimate of the number of adolescents not being served in the area;

(5)(A) in the case of an applicant who will provide care services, a description of how all core services will be provided in the demonstration project using funds under this subchapter or will otherwise be provided by the grantee in the area to be served, the population to which such services will be provided, how such services will be coordinated, integrated, and linked with other related programs and services and the source or sources of funding of such core services in the public and private sectors; and

(B) in the case of an applicant who will provide prevention services, a description of the necessary services to be provided and how the applicant will provide such services;

(6) a description of the manner in which adolescents needing services other than the services provided directly by the applicant will be identified and how access and appropriate referral to such other services (such as medicaid; licensed adoption agencies; maternity home services; public assistance; employment services; child care services for adolescent parents; and other city, county, and State programs related to adolescent pregnancy) will be provided, including a description of a plan to coordinate such other services with the services supported under this subchapter;

(7) a description of the applicant's capacity to continue services as Federal funds decrease and in the absence of Federal assistance;

(8) a description of the results expected from the provision of services, and the procedures to be used for evaluating those results;

(9) a summary of the views of public agencies, providers of services, and the general public in the geographic area to be served, concerning the proposed use of funds provided for a demonstration project for services under this subchapter and a description of procedures used to obtain those views, and, in the case of applicants who propose to coordinate services administered by a State, the written comments of the appropriate State officials responsible for such services;

(10) assurances that the applicant will have an ongoing quality assurance program;

(11) assurances that, where appropriate, the applicant shall have a system for maintaining the confidentiality of patient records in accordance with regulations promulgated by the Secretary;

(12) assurances that the applicant will demonstrate its financial responsibility by the use of such accounting procedures and other requirements as may be prescribed by the Secretary;

(13) assurances that the applicant (A) has or will have a contractual or other arrangement with the agency of the State (in which the applicant provides services) that administers or supervises the administration of a State plan approved under title XIX of the Social Security Act for the payment of all or a part of the applicant's costs in providing health services to persons who are eligible for medical assistance under such a State plan, or (B) has made or will make every reasonable effort to enter into such an arrangement;

(14) assurances that the applicant has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to benefits under title V of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any other public assistance program or private health insurance program;

(15) assurances that the applicant has or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing services to persons entitled to services under parts B and E of title IV and title XX of the Social Security Act;

(16)(A) a description of—

(i) the schedule of fees to be used in the provision of services, which shall comply with section 300z-3(c) of this title and which shall be designed to cover all reasonable direct and indirect costs incurred by the applicant in providing services; and

(ii) a corresponding schedule of discounts to be applied to the payment of such fees, which shall comply with section 300z-3(c) of this title and which shall be adjusted on the basis of the ability of the eligible person to pay;

(B) assurances that the applicant has made and will continue to make every reasonable effort—

(i) to secure from eligible persons payment for services in accordance with such schedules;

(ii) to collect reimbursement for health or other services provided to persons who are entitled to have payment made on their behalf for such services under any Federal or other government program or private insurance program; and

(iii) to seek such reimbursement on the basis of the full amount of fees for services without application of any discount; and

(C) assurances that the applicant has submitted or will submit to the Secretary such reports as the Secretary may require to determine compliance with this paragraph;

(17) assurances that the applicant will make maximum use of funds available under subchapter VIII of this chapter;

(18) assurances that the acceptance by any individual of family planning services or family planning information (including educational materials) provided through financial assistance under this subchapter shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service furnished by the applicant;

(19) assurances that fees collected by the applicant for services rendered in accordance with this subchapter shall be used by the applicant to further the purposes of this subchapter;

(20) assurances that the applicant, if providing both prevention and care services will not exclude or discriminate against any adolescent who receives prevention services and subsequently requires care services as a pregnant adolescent;

(21) a description of how the applicant will, as appropriate in the provision of services—

(A) involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent;

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(22)(A) assurances that—

(i) except as provided in subparagraph (B) and subject to clause (ii), the applicant will notify the parents or guardians of any unemancipated minor requesting services from the applicant and, except as provided in subparagraph (C), will obtain the permission of such parents or guardians with respect to the provision of such services; and

(ii) in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor under clause (i) within a reasonable period of time;

(B) assurances that the applicant will not notify or request the permission of the parents or guardian of any unemancipated minor without the consent of the minor—

(i) who solely is requesting from the applicant pregnancy testing or testing or treatment for venereal disease;

(ii) who is the victim of incest involving a parent; or

(iii) if an adult sibling of the minor or an adult aunt, uncle, or grandparent who is related to the minor by blood certifies to the grantee that notification of the parents or guardians of such minor would result in physical injury to such minor; and

(C) assurances that the applicant will not require, with respect to the provision of services, the permission of the parents or guardians of any pregnant unemancipated minor if such parents or guardians are attempting to compel such minor to have an abortion;

(23) assurances that primary emphasis for services supported under this subchapter shall be given to adolescents seventeen and under who are not able to obtain needed assistance through other means;

(24) assurances that funds received under this subchapter shall supplement and not supplant funds received from any other Federal, State, or local program or any private sources of funds; and

(25) a plan for the conduct of, and assurances that the applicant will conduct, evaluations of the effectiveness of the services supported under this subchapter in accordance with subsection (b) of this section.

EVALUATIONS: AMOUNT, CONDUCT, AND TECHNICAL ASSISTANCE

(b)(1) Each grantee which receives funds for a demonstration project for services under this subchapter shall expend at least 1 per centum but not in excess of 5 per centum of the amounts received under this subchapter for the conduct of evaluations of the services supported under this subchapter. The Secretary may, for a particular grantee upon good cause shown, waive the provisions of the preceding sentence with respect to the amounts to be expended on evaluations, but may not waive the requirement that such evaluations be conducted.

(2) Evaluations required by paragraph (1) shall be conducted by an organization or entity which is independent of the grantee providing services supported under this subchapter. To assist in conducting the evaluations required by paragraph (1), each grantee shall develop a working relationship with a college or university located in the grantee's State which will provide or assist in providing monitoring and evaluation of services supported under this subchapter unless no college or university in the grantee's State is willing or has the capacity to provide or assist in providing such monitoring and assistance.

(3) The Secretary may provide technical assistance with respect to the conduct of evaluations required under this subsection to any grantee which is unable to develop a working relationship with a college or university in the applicant's State for the reasons described in paragraph (2).

REPORTS

(c) Each grantee which receives funds for a demonstration project for services under this subchapter shall make such reports concerning its use of Federal funds as the Secretary may require. Reports shall include, at such times as are considered appropriate by the Secretary, the results of the evaluations of the services supported under this subchapter.

NOTIFICATION OF PARENTS; DEFINITION

(d)(1) A grantee shall periodically notify the Secretary of the exact number of instances in which a grantee does not notify the parents or guardians of a pregnant unemancipated minor under subsection (a)(22)(B)(iii) of this section.

(2) For purposes of subsection (a)(22)(B)(iii) of this section, the term "adult" means an adult as defined by State law.

SUBMISSION OF APPLICATIONS TO GOVERNOR; COMMENTS BY GOVERNOR

(e) Each applicant shall provide the Governor of the State in which the applicant is located a copy of each application

submitted to the Secretary for a grant for a demonstration project for services under this subchapter. The Governor shall submit to the applicant comments on any such application within the period of sixty days beginning on the day when the Governor receives such copy. The applicant shall include the comments of the Governor with such application.

AVAILABILITY OF CORE SERVICES

(f) No application submitted for a grant for a demonstration project for care services under this subchapter may be approved unless the Secretary is satisfied that core services shall be available through the applicant within a reasonable time after such grant is received.

(July 1, 1944, c. 373, Title XX, § 2006, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 585.)

§ 300z-6. Coordination of programs

(a) The Secretary shall coordinate Federal policies and programs providing services relating to the prevention of adolescent sexual relations and initial and recurrent adolescent pregnancies and providing care services for pregnant adolescents. In achieving such coordination, the Secretary shall—

(1) require grantees who receive funds for demonstration projects for services under this subchapter to report periodically to the Secretary concerning Federal, State, and local policies and programs that interfere with the delivery of and coordination of pregnancy-prevention services and other programs of care for pregnant adolescents and adolescent parents;

(2) provide technical assistance to facilitate coordination by State and local recipients of Federal assistance;

(3) review all programs administered by the Department of Health and Human Services which provide prevention services or care services to determine if the policies of such programs are consistent with the policies

of this subchapter, consult with other departments and agencies of the Federal Government who administer programs that provide such services, and encourage such other departments and agencies to make recommendations, as appropriate, for legislation to modify such programs in order to facilitate the use of all Government programs which provide such services as a basis for delivery of more comprehensive prevention services and more comprehensive programs of care for pregnant adolescents and adolescent parents;

(4) give priority in the provision of funds, where appropriate, to applicants using single or coordinated grant applications for multiple programs; and

(5) give priority, where appropriate, to the provision of funds under Federal programs administered by the Secretary (other than the program established by this subchapter) to projects providing comprehensive prevention services and comprehensive programs of care for pregnant adolescents and adolescent parents.

(b) Any recipient of a grant for a demonstration project for services under this subchapter shall coordinate its activities with any other recipient of such a grant which is located in the same locality.

(July 1, 1944, c. 373, Title XX, § 2007, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-7. Research

GRANTS AND CONTRACTS; DURATION, RENEWAL; AMOUNT

(a)(1) The Secretary may make grants and enter into contracts with public agencies or private organizations or institutions of higher education to support the research and dissemination activities described in paragraphs (4), (5), and (6) of section 300z(b) of this title.

(2) The Secretary may make grants or enter into contracts under this section for a period of one year. A grant or contract under this section for a project may be renewed for four additional one-year periods, which need not be consecutive.

(3) A grant or contract for any one-year period under this section may not exceed \$100,000 for the direct costs of conducting research or dissemination¹ activities under this section and may include such additional amounts for the indirect costs of conducting such activities as the Secretary determines appropriate. The Secretary may waive the preceding sentence with respect to a specific project if he determines that—

(A) exceptional circumstances warrant such waiver and that the project will have national impact; or

(B) additional amounts are necessary for the direct costs of conducting limited demonstration projects for the provision of necessary services in order to provide data for research carried out under this subchapter.

(4) The amount of any grant or contract made under this section may remain available for obligation or expenditure after the close of the one-year period for which such grant or contract is made, in order to assist the recipient in preparing the report required by subsection (f)(1) of this section.

SCOPE OF PERMISSIBLE ACTIVITIES

(b)(1) Funds provided for research under this section may be used for descriptive or explanatory surveys, longitudinal studies, or limited demonstration projects for services that are for the purpose of increasing knowledge and understanding of the matters described in paragraphs (4) and (5) of section 300z(b) of this title.

¹ So in original. Probably should be "dissemination".

(2) Funds provided under this section may not be used for the purchase or improvement of land, or the purchase, construction, or permanent improvement (other than minor remodeling) of any building or facility.

APPLICATIONS

(c) The Secretary may not make any grant or enter into any contract to support research or dissemination activities under this section unless—

(1) the Secretary has received an application for such grant or contract which is in such form and which contains such information as the Secretary may by regulation require;

(2) the applicant has demonstrated that the applicant is capable of conducting one or more of the types of research or dissemination activities described in paragraph (4), (5), or (6) of section 300z(b) of this title; and

(3) in the case of an application for a research project, the panel established by subsection (e)(2) of this section has determined that the project is of scientific merit.

COORDINATION WITH NATIONAL INSTITUTES OF HEALTH

(d) The Secretary shall, where appropriate, coordinate research and dissemination activities carried out under this section with research and dissemination activities carried out by the National Institutes of Health.

REVIEW OF APPLICATIONS FOR GRANTS AND CONTRACTS; ESTABLISHMENT OF REVIEW PANEL

(e)(1) The Secretary shall establish a system for the review of applications for grants and contracts under this section. Such system shall be substantially similar to the system for scientific peer review of the National Institutes of Health and shall meet the requirements of paragraphs (2) and (3).

(2) In establishing the system required by paragraph (1), the Secretary shall establish a panel to review applications under this section. Not more than 25 per centum of the members of the panel shall be physicians. The panel shall meet as often as may be necessary to facilitate the expeditious review of applications under this section, but not less than once each year. The panel shall review each project for which an application is made under this section, evaluate the scientific merit of the project, determine whether the project is of scientific merit, and make recommendations to the Secretary concerning whether the application for the project should be approved.

(3) The Secretary shall make grants under this section from among the projects which the panel established by paragraph (2) has determined to be of scientific merit and may only approve an application for a project if the panel has made such determination with respect to such a project. The Secretary shall make a determination with respect to an application within one month after receiving the determinations and recommendations of such panel with respect to the application.

REPORTS

(f)(1)(A) The recipient of a grant or contract for a research project under this section shall prepare and transmit to the Secretary a report describing the results and conclusions of such research. Except as provided in subparagraph (B), such report shall be transmitted to the Secretary not later than eighteen months after the end of the year for which funds are provided under this section. The recipient may utilize reprints of articles published or accepted for publication in professional journals to supplement or replace such report if the research contained in such articles was supported under this section during the year for which the report is required.

(B) In the case of any research project for which assistance is provided under this section for two or more consecutive one-year periods, the recipient of such assistance shall prepare and transmit the report required by subparagraph (A) to the Secre-

tary not later than twelve months after the end of each one-year period for which such funding is provided.

(2) Recipients of grants and contracts for dissemination under this section shall submit to the Secretary such reports as the Secretary determines appropriate.

COLLECTION OF SURVEY DATA USED PRIMARY FOR GENERATION OF NATIONAL POPULATION ESTIMATES

(g) In carrying out functions relating to the conduct and support of research under this section, the Secretary shall not be subject to the provisions of chapter 35 of Title 44, except with respect to the collection of survey data which primarily will be used for the generation of national population estimates.

(July 1, 1944, c. 373, Title XX, § 2008, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-8. Evaluation and administration

(a) Of the funds appropriated under this subchapter, the Secretary shall reserve not less than 1 per centum and not more than 3 per centum for the evaluation of activities carried out under this subchapter. The Secretary shall submit to the appropriate committees of the Congress a summary of each evaluation conducted under this section.

(b) The officer or employee of the Department of Health and Human Services designated by the Secretary to carry out the provisions of this subchapter shall report directly to the Assistant Secretary for Health with respect to the activities of such officer or employee in carrying out such provisions.

(July 1, 1944, c. 373, Title XX, § 2009, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-9. Authorization of appropriations

(a) For the purpose of carrying out this subchapter, there are authorized to be appropriated \$30,000,000 for the fiscal year

ending September 30, 1982, \$30,000,000 for the fiscal year ending September 30, 1983, and \$30,000,000 for the fiscal year ending September 30, 1984.

(b) At least two-thirds of the amounts appropriated to carry out this subchapter shall be used to make grants for demonstration projects for services.

(c) Not more than one-third of the amounts specified under subsection (b) of this section for use for grants for demonstration projects for services shall be used for grants for demonstration projects for prevention services.

(July 1, 1944, c. 373, Title XX, § 2010, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-10. Restrictions

(a) Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

(b) The Secretary shall ascertain whether programs or projects comply with subsection (a) of this section and take appropriate action if programs or projects do not comply with such subsection, including withholding of funds.

(July 1, 1944, c. 373, Title XX, § 2011, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 592.)

EXHIBIT B

TITLE VI—GRANT PROGRAM

FINDINGS AND PURPOSES

SEC. 601. (a) The Congress finds that—

- (1) adolescents are at a high risk of unwanted pregnancy;
- (2) in 1975, almost 1,000,000 adolescents became pregnant and nearly 600,000 carried their babies to term;
- (3) pregnancy and childbirth among adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low-birth-weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;
- (4) an adolescent who becomes pregnant once is likely to experience rapid repeat pregnancies and childbearing, with increased risks;
- (5) the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services;
- (6) such services, including a wide array of educational and supportive services, often are not available to the adolescents who need them, or are available but fragmented and thus of limited effectiveness in preventing pregnancies and future welfare dependency; and
- (7) Federal policy therefor should encourage the development of appropriate health, educational, and social services where they are now lacking or inadequate, and

the better coordination of existing services where they are available in order to prevent unwanted early and repeat pregnancies and to help adolescents become productive, independent contributors to family and community life.

(b) Therefore, the purposes of this Act are—

- (1) to establish better coordination, integration, and linkages among existing programs in order to expand and improve the availability of, and access to, needed comprehensive community services which assist in preventing unwanted initial and repeat pregnancies among adolescents, enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life, with primary emphasis on services to adolescents who are 17 years of age and under and are pregnant or who are parents;
- (2) to expand the availability of such services that are essential to that objective; and
- (3) to promote innovative, comprehensive, and integrated approaches to the delivery of such services.

DEFINITIONS

SEC. 602. For the purposes of this Act, the term—

- (1) "Secretary" means the Secretary of the Department of Health, Education, and Welfare;
- (2) "eligible person" means—
 - (A) with regard to the provision of all necessary core services and such necessary supplemental services as may be available, a pregnant adolescent or an adolescent parent; or
 - (B) with regard to the provision of the services described in paragraphs (4)(A), (4)(B), and (4)(G)

and referral to such other services which may be appropriate, a nonpregnant adolescent;

(3) "eligible grant recipient" means a public or non-profit private organization or agency which demonstrates, to the satisfaction of the Secretary, the capability of providing in a single setting all core services or the capability of creating a network through which all core services would be provided;

(4) "core services" means those services which shall be provided by all grantees which are—

(A) pregnancy testing, maternity counseling, and referral services;

(B) family planning services, except that such services for nonpregnant adolescents shall be limited to counseling and referral unless suitable and appropriate family planning services are not otherwise available in the community;

(C) primary and preventive health services including pre- and post-natal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services in sexuality and family life (including sex education), and including family planning information;

(H) referral to appropriate educational and vocational services;

(I) adoption counseling and referral services; and

(J) referral to other appropriate health services.

(5) "supplemental services" means those services which may be provided and are—

(A) child care sufficient to enable the adolescent parent to continue her education or to enter into employment;

(B) consumer education and homemaking;

(C) counseling for extended family members of the eligible person;

(D) transportation; and

(E) such other services consistent with the purposes of this Act as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(6) "adolescent parent" means a parent under the age of 21.

AUTHORITY TO MAKE GRANTS

SEC. 603. The Secretary may make grants to further the purposes of this Act to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 606 for projects which the Secretary determines will help communities provide core and supplemental services in easily accessible locations, assure a continuity of services and appropriate assistance, and coordinate, integrate, and establish linkages among such services. Projects shall, as appropriate, provide, supplement, or improve the quality of such services, and in providing services, give primary emphasis to adolescents who are 17 years of age or under and are pregnant or who are parents.

USES OF GRANTS

SEC. 604. (a) Funds provided under this Act may be used by grantees only to—

(1) provide core services to eligible persons;

(2) coordinate, integrate, and provide linkages among providers of core, supplemental, and other services for eligible persons in furtherance of the purposes of this Act;

(3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent pregnancy;

(4) plan for the administration and coordination of pregnancy prevention and pregnancy-related services for adolescents (including family life and sex education), which will further the objectives of this Act; and

(5) fulfill assurances required for grant approval by section 606.

(b) Grantees shall charge fees for services only pursuant to a fee schedule, approved by the Secretary as a part of the application described in section 606, which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. In no case may a grantee discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services.

PRIORITIES, AMOUNTS, AND DURATION OF GRANTS

SEC. 605. (a) In approving applications for grants under this Act, the Secretary shall give priority to applicants who—

(1) serve an area where there is a high incidence of adolescent pregnancy;

(2) serve an area where the incidence of low-income families is high and where the availability of pregnancy-related services is low;

(3) show evidence of having the ability to bring together a wide range of needed care and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for adolescents at risk of initial or repeat pregnancies;

(4) will utilize to the maximum extent feasible, existing available programs and facilities such as neighborhood and primary health care centers, family planning clinics, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention and pregnancy-related services;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the project non-Federal funds, personnel, and facilities; and

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the project.

(b)(1) The amount of a grant under this Act shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention and pregnancy-related services in the area to be served.

(2) In making grants under this Act, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds in consideration of the relative number of adolescents in such areas in need of such services.

FEB 23 1988

IN THE

JOSEPH F. SPANIOL, JR.
CLERK**Supreme Court of the United States**

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
v. *Appellant,*

CHAN KENDRICK, *et al.*

On Appeal from the United States
District Court for the District of Columbia

REPLY BRIEF OF UNITED FAMILIES OF AMERICA

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February 23, 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

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REPLY BRIEF OF UNITED FAMILIES OF AMERICA

I. The District Court Erred In Holding That Religiously Affiliated Organizations Must Be Excluded From Involvement In The AFLA

The question in this case is whether, as the district court held, qualified private organizations must be excluded from participation in an otherwise neutral grant program solely on the basis of religious belief or affiliation. It thus poses a straightforward question of law: does the Establishment Clause require government-funded, privately-administered programs to be *secular*, or does it require the government to be *neutral* between religion and nonreligion? In our opening brief, United Families of America contended that when the government enters a field of social endeavor previously occupied by private (including religious) voluntary associations and provides resources to support and expand those private activities, it must employ neutral, objective, secular criteria for the selection of grantees and distribution of funds. Religious organizations must be neither favored nor disfavored.

By "neutral," we mean, of course, that the program must be neutral with regard to religion. The AFLA is not neutral, nor need it be neutral, with regard to such issues as adolescent sexuality, adoption, or abortion. This Court has confirmed that government is permitted to "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977). Government promotion of this "value judgment" through the allocation of public funds cannot be challenged under the Establishment Clause on the ground that it "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980), quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). The government is not required to be neutral with regard to issues of "traditionalist" morality (448 U.S. at 319)—especially since those issues have significant relation to public health. It is, however, required to be neutral with regard to religion. The government is entitled to promote adolescent sexual self-discipline and adoption as alternatives to "safe sex" and abortion, but it must do so without showing a preference for religious institutions over secular, or secular over religious.

As participants in government-funded programs, religious organizations, like any others, must comply with all lawful statutory and administrative terms of the grant program. In this case, those terms include the requirement that grantees not use AFLA funds to "teach or promote religion." J.A. 757, 759, 761. It is common ground that a few AFLA grantees have violated this restriction, indeed, that some AFLA grantees have been reprimanded and even barred from the program for violations of grant restrictions. It is possible that there have been additional violations, in which case there may need to be additional sanctions against violators. This, we emphasize, is common ground. Where we differ from appellees and the court below, however, is that we believe the First Amendment does not require, but affirmatively pro-

hibits, the government from treating all religiously-affiliated organizations as violators, simply on the basis of their beliefs and affiliations. "The Establishment Clause does not license government to treat religion and those who teach or practice it, *simply by virtue of their status as such*, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (emphasis added).

Religious organizations are not pariahs, any more than they are paragons. Most of the religiously-affiliated organizations involved in the AFLA have complied with the grant terms and performed valuable public services.¹ There is no basis for excluding them from the program in the absence of appropriate determinations that they have violated the terms of the grant. The issue before this Court is not whether there have been violations, but whether, in the absence of proof, the government must rely on a conclusive presumption that religious organizations are unfit for participation in the AFLA.

a. Appellees' brief attempts to distract from the legal issue in this case by a lengthy and one-sided recital of factual assertions that were not among the district court's findings of fact. The district court's factual findings were few, largely because the legal theory on which its summary judgment rested—that no religiously-affiliated organizations may participate in government-funded programs related to their religious mission—does not hinge upon particularized findings. On appellate review of a grant of summary judgment, the party opposing summary judgment is entitled to a construction of the facts in the light most favorable to its position, and to resolu-

¹ We especially commend to this Court's attention the *amicus curiae* briefs filed by Catholic Charities, U.S.A., and by the Institute for Youth Advocacy, Covenant House, describing the operation of some of the AFLA grantees that will be defunded if the order below is not reversed.

tion of all disputed issues in its favor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Under this standard, it must be assumed that most religiously-affiliated AFLA grantees have provided the secular services the government wishes to promote, without engaging in any diversion of grant funds to proscribed religious uses and without violating any grant conditions. They have done nothing wrong," other than to exercise their constitutionally protected right to believe as their conscience dictates.

Appellees' felt need to supplement the decision below with "facts" not found by the district court powerfully demonstrates the deficiencies in the district court's judgment. If acceptance of appellees' position requires relying on facts not thought material by the district court, then the obvious conclusion, even under their theory of the case, is to remand for further proceedings.

b. More important than these factual deficiencies, however, is the district court's erroneous interpretation of the Establishment Clause. This Court cannot be expected to comb the record in this case to determine, as a factual matter, whether or how many AFLA grantees have violated the grant terms. This Court must, however, determine whether the district court correctly construed the Establishment Clause.

Appellees concede that the district court's decision is not neutral toward religion. Neutrality, appellees assert, is "alluring in the abstract," but is not the goal of the Establishment Clause. App. Br. 56. Instead of neutrality, appellees advocate the following standard: "Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions." *Ibid.* This is simply a restatement of the strict "no-aid" theory long disavowed by this Court. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Mueller v.*

Allen, 463 U.S. 388, 393 (1983); *McDaniel v. Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). The correct proposition is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). See *Witters v. Department of Services*, 106 S. Ct. 748 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Bradfield v. Roberts*, 175 U.S. 291 (1899). To insist that government spending programs never "so much as risk supporting the sectarian mission of those institutions" (App. Br. 56) would require a systematic hostility toward religion. *Roemer v. Board of Public Works*, 426 U.S. 736, 746-47 (1976) (plurality opinion per Blackmun, J.); *Widmar v. Vincent*, 454 U.S. at 274-75.

An organization's "sectarian mission" is inevitably advanced by participation in government benefits, whether they are support for the organization's social welfare activities, tax exemptions for its place of worship, tax deductions or tuition subsidies for its schools, or even police protection for its property. This cannot be decisive. The issue in each case must be whether the government's action is based on truly neutral, objective criteria, not on whether one effect is to benefit religion. If the benefit is extended to an organization without regard to its religious character or affiliation, the benefit does not offend the Establishment Clause, even though it obviously will have the effect of "supporting" the organization's "sectarian mission" of feeding the poor, healing the sick, worship, education, or fellowship.²

² This is why the parochial school cases have proven so difficult: while the criteria for aid are ostensibly (and perhaps genuinely) secular and neutral, the vast preponderance of recipient institutions are, and are known in advance to be, sectarian. This case is easier to resolve, because the criteria are neutral and the recipient institutions are predominantly secular.

In our opening brief (at 27-30), we demonstrated that AFLA funds are distributed on the basis of neutral criteria, without regard to religion, as Congress intended. Indeed, more than 75 per cent of the grantees have no religious affiliation. *Compare J.A. 748-54 with 755-56* (at most 25 of the 100 grantees have religious affiliation). For purposes of appellate review, moreover, the decisive point is that the district court made no finding that the AFLA grants have in any way been "skewed toward religion." *Witters* 106 S. Ct. at 752.³ On the contrary, the district court concluded, as a matter of law, that the Constitution requires the program to be skewed *against* religion. While it is open to appellees on remand to demonstrate that the Act has not in fact been neutrally administered, the district court's holding that religiously-affiliated organizations must be categorically excluded is wrong in principle.

Perhaps recognizing that neutrality toward religion is not irrelevant, appellees assert four reasons why they believe the AFLA is not neutral. First, they claim that "by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations." App. Br. 57. However, the AFLA does *not* require religious involvement any more than it does the involvement of other community groups. At every point in the statute where "religious organizations" are mentioned, they are included as part of a broad class of community organizations: "religious and charitable organizations, voluntary associations, and other groups in

³ Evidently aware of the lack of a factual finding on this key point, appellees offer their own assessment of the record. They contend that the record shows that AFLA administrators were biased toward religious organizations in their selection of grantees. See App. Br. 7-10. The district court made no such factual finding, and evidence in the record contradicts it (*see, e.g.*, J.A. 781-83). In any event, resolution of disputed issues of material fact is appropriate for remand and not for this Court on appeal from a grant of summary judgment.

the private sector as well as services sponsored by publicly sponsored initiatives." 42 U.S.C. §§ 300z(a)(8)(B), (10)(C), 300z-5(a)(21). All community organizations—public and private, religious and secular—are to be involved "as appropriate." As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).⁴

Second, appellees observe that "the AFLA is a competitive grant program," but they do not explain why this makes it "decidedly *non*-neutral." App. Br. 57. The question is whether the competition is based on objective, secular criteria. Since more than three quarters of the "winners" of the "competition" are nonreligious, this suggests that the program is in fact neutral.

Third, appellees assert that "only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding." App. Br. 57. This assertion is both untrue and logically misleading. It is untrue because AFLA restric-

⁴ Appellees' repeated assertion that the AFLA requires the involvement of religious organizations (*e.g.*, App. Br. 1, 2, 3) contradicts the district court's interpretation of the statute (U.S.J.S. App. 21a) (*emphasis added*):

Title VI was amended not only to add religious organizations to the list of entities that *may* participate in AFLA programs, but also to add families, charitable organizations, voluntary associations, and other groups. *See* 42 U.S.C. § 300z-5(a)(21)(B). Religious organizations are only one of five types of entities that *may be* involved in an AFLA program.

Of course, Congress intended religious groups—along with others—to be involved as appropriate, but that is a far cry from appellees' statement that the "AFLA's mandates on religious involvement give religion a preference over nonreligion." App. Br. 31.

tions are not based on a grantee's "beliefs," but only on its willingness to abide by law in its administration of AFLA projects. As the district court stated, "[b]y prohibiting a grant recipient from advocating abortion in an AFLA program or project, the AFLA did not condition a 'benefit' on a particular religious belief but merely restricts a *program or project* from using federal tax dollars to advocate a particular course of action." U.S. J.S. App. 14a-15a (emphasis in original). A grantee can believe whatever it wishes, and can conduct its affairs—other than the AFLA project—however it wishes. Appellees' assertion is logically misleading because it implies that to be "neutral" the government must engage in programs that are equally desirable to every religious sect. This is not the meaning of neutrality. That some religions advocate feeding the poor while others believe in the sanctity of work and self-reliance for the able-bodied, for example, does not make grants for feeding programs "non-neutral" in a constitutional sense. Government is neutral, in this context, if its program requirements are set on a neutral, secular basis and all organizations are eligible for participation without discrimination on the basis of religion. *Gillette v. United States*, 401 U.S. at 437 (1971).

Ironically, the program appellees support, which would require grantees to provide the full range of pregnancy-related services (see App. Br. 21-22), would be unconstitutional under the standard they espouse in this case. Participation in such programs would be open only to religious organizations that are willing to provide abortion and artificial contraception, just as the AFLA is open only to those willing to foster sexual self-discipline and adoption. Under appellees' theory of the case, Title X of the Public Health Services Act, 42 U.S.C. § 300a (1982), the nation's largest family planning program, is constitutionally indistinguishable from the AFLA and must be struck down if the decision below is affirmed. Title X makes grants to private organizations, including

churches,⁵ for provision of services, notably contraceptive services and counselling, that accord with some (but not all) religious doctrines.

The fourth, and "perhaps most important[]," reason appellees claim the AFLA is "*non-neutral*" is that "the ultimate beneficiaries, the targeted adolescents, are presented with government sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescent." App. Br. 57. This is a strange contention indeed. In a world of differing views, the only way that "targeted adolescents" can exercise a choice in the philosophy of the service provider is if the widest possible array of grantees is permitted, consistent with the purposes of the statute.

This point merits elaboration, for it identifies a principal philosophical difference between appellees and ourselves. We believe that in an area of great sensitivity, upon which there are many differing moral, political, religious, medical, and practical points of view, the public policy most consistent with the pluralistic vision of the First Amendment is for the government to extend funding to as broad and diverse a range of private and community associations as may contribute to the statute's secular objective. It is better—fairer, more neutral, more effective—for the government to facilitate a wide variety of private and community organizations, each of them free to approach the statutory objective in its own way, rather than to attempt to impose a secular perspective on a diverse society.

Religious pluralism has advantages for practical as well as theoretical legal reasons. A significant subsection within our society is unreceptive to forms of "sex education" they believe to be inimical to their religious beliefs. Unless a program such as the AFLA can work within a

⁵ See HHS, *Family Planning Grantees, Delegates, and Clinics* (1987/1988 Directory) (listing religious organizations as among the Title X grantees).

context that they can trust, the children within these groups will not be permitted to participate, with potentially grave consequences to their own well-being and the goals of the program. Only a program that works with the cooperation of trusted intermediary institutions, such as churches and community groups, will be effective in reaching out to the many diverse elements of the United States population in ways they can understand and appreciate.

Appellees, in contrast, contend that the government has no option other than to insist on a homogeneous secular approach to these moral questions, an approach that does not reflect the religious and philosophical variety of our people. Appellees complain, for example, that federal funds were used "to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs" (App. Br. 34), and that one secular grantee stated that it would not "contradict [that] which is taught at home or in church" (*id.* at 11)—as if the Constitution required a studied insensitivity and intolerance toward religion. Appellees castigate two secular grantees, the Southeast Missouri Association of Public Health Administrators (SeMo) and Memorial General Hospital of West Virginia, for helping teenagers and their families to learn to discuss pregnancy-related issues in terms of "their own values." *Id.* at 10, 11. The predictable result of appellees' approach would be a program less respectful toward individual religious beliefs, with less freedom of choice for adolescent beneficiaries, less diversity, and less effective communication with those portions of the population who do not speak the language of secularized morality.

We can think of no less intrusive way for the federal government to promote sexual self-discipline and related statutory purposes than to encourage individuals, families, and private associations, including churches, to deal with these issues in terms of *their own* values. Certainly, this is far superior to imposing secular values

upon all participants in the program. There is a difference between promoting religion and being sensitive to the religious background many families bring to these issues. Nothing in the Constitution requires government-funded grantees to be indifferent or hostile to the religious values of the people they are asked to help. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

c. Appellees concede that religious organizations are not, and should not be, categorically excluded from participating in government-funded social welfare programs, such as those to feed the hungry or house the poor. App. Br. 1-2, 53.⁶ They attempt to distinguish the AFLA, however, apparently on the ground that the AFLA constitutes a form of education—more specifically "sex education"—and is therefore closer to parochial school aid than to social welfare programs. App. Br. 48-49, 53. Putting aside for the moment the fact that many AFLA services have nothing to do with sex or any other education,⁷ appellees fail to respond to any of the reasons set forth at length in our opening brief (at 45-47) for why parochial school aid has been consistently treated by this Court under an especially stringent standard. To review those reasons: (1) parochial school aid is directed to a class of institutions that are overwhelmingly religious in nature, rather than to a genuinely neutral class of recipient institutions; (2) parochial school aid decisions have, without exception, been predicated on a factual finding that the recipient institutions were "pervasively sectarian"; and (3) parochial schools are designed to create a total environment in which religious teaching is incorporated into a sustained, comprehensive education covering virtually all aspects of life. These are the reasons why the *Lemon* test invalidates most forms of aid to

⁶ Appellees' position on this is not consistent through the brief. With the statements cited in text, compare, e.g., App. Br. 54 (the "constitutional dividing line between [parochial] schools and institutions providing 'social welfare services' . . . does not exist").

⁷ See our opening brief, at 47-49.

parochial schools while upholding neutral aid to discrete religious social welfare functions. None of these reasons apply to the AFLA, in which most grantees are secular, many of the religiously-affiliated grantees are far from being "pervasively sectarian," and the services are discrete and unconnected to any larger program of religious education.

Appellees' distinction between the AFLA and other social welfare activities is rooted in their conviction that "these issues are of fundamental religious importance." App. Br. 36. Indeed, appellees understand the AFLA as constituting "government fund[ing] [of] both religious institutions and secular institutions to promote religious beliefs." App. Br. 30. *See also* App. Br. 4 (the AFLA makes "instructions and indoctrination of certain values concerning sexuality a major component of the Act"). It is not so much the affiliations of the grantees as the nature of the statutory objective to which appellees object. Appellees' distinction between the AFLA and other social welfare programs is rooted in their fundamental disagreement with *Maher v. Roe* and *Harris v. McRae*. They cannot accept that, from an Establishment Clause perspective, the encouragement of adolescent sexual self-discipline and adoption is a secular purpose. But if they were right—if sex education were intrinsically a religious matter—the proper result would be to forbid the government from entering the field at all.⁸

It is only on the premise that teaching adolescents about sexuality is a legitimate secular enterprise that sex education is constitutionally permissible at all. And if it is a legitimate secular enterprise, there is no reason why nonreligious organizations should be favored over religious. Indeed, the more sensitive the subject matter,

⁸ And it is important for these purposes to recall, as appellees point out (App. Br. 24 & n.54), that sex education encouraging contraception and abortion is no less "religious" than the opposite. Some religions take one view, some religions take the other.

the more important it is to treat it without bias for or against religion.

d. Appellees are rightly concerned about the appearance of endorsement of religion. App. Br. 1, 22-24. They completely disregard, however, the equal and opposite danger of an appearance of disapproval of religion. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The ideal statute is one that *includes* religious organizations, but without special place or recognition. The AFLA, we submit, is such a statute. Congress took great care to refer to religious organizations *only* as among a broad array of charitable and voluntary associations, public and private. As this Court has observed, "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Viewed in the larger context of predominantly secular grantees under the AFLA—and especially in the context of the panoply of federal family planning programs that take a different approach from the AFLA—no reasonable observer would conclude that the inclusion of some religiously-affiliated grantees under this statute sends a message of endorsement of religion over nonreligion.

e. In our opening brief, we showed that, even under the more restrictive criteria applicable to programs that are not genuinely and reliably neutral in their distribution of funds, the district court's order was overbroad in three respects. First, it excluded potential participants on the basis of mere religious affiliation—sometimes quite nominal—rather than confining its proscription to organizations so "pervasively sectarian" that they could not separate religious from nonreligious activities (pages 37-40). Second, it excluded organizations without any finding that they had used AFLA funds for "specifically religious" purposes (pages 40-43). Third, it prohibited religious organizations from providing even those non-

educational care services that are inherently nonsectarian and nonideological, such as pregnancy testing, housing, health and nutrition, and adoption services (pages 47-49).

Nothing in appellees' brief contradicts our contention that the district court's judgment is at best overbroad. To be sure, appellees attempt in their brief to supply the factual findings so lacking in the district court's opinion. The district court expressly declined to rule on whether any individual grantee was "pervasively sectarian" (U.S. J.S. App. 23a-25a). Appellees compensate by offering their opinion (dressed up as fact) that three of the grantees, St. Margaret's, St. John's, and Brigham Young University, are "pervasively sectarian." App. Br. 42.⁹ Similarly, appellees assert that AFLA funds were used for "specifically religious activit[ies]" (App. Br. 33-34, quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)), referring to several alleged incidents that the district court did not mention and about which the district court made no findings of fact. (Like the district court, appellees simply ignore the existence of inherently nonsectarian services funded under the Act.) It is possible that appellees may be correct about these and other factual assertions, but the assertions of a party to the litigation are no substitute for judicial fact-finding.

In any event, most of the charges appellees have culled from the record are wholly immaterial to the issue whether grantees have used AFLA grant funds to promote religion. Appellees' characterization of the facts must be read with a skeptical eye. While there is neither need nor space for a point-by-point analysis, we would observe that most of appellees' alleged abuses consist of one of the following: (1) the content of grant applica-

⁹ Appellees do not attempt to defend the district court's unprecedented theory, discussed in our opening brief (at 37 n.22), that it had no need to determine whether AFLA grantees were "pervasively sectarian."

tions, with no showing that the specifically religious aspects were approved or carried out;¹⁰ (2) religious activities by *participants* in the programs, as opposed to *grantees*;¹¹ (3) religious activities by grantees *outside* the AFLA program, at their own expense;¹² (4) presentations by grantees to religious audiences, whatever their content;¹³ (5) religious motivations of AFLA grantees, with no showing of the teaching or promotion

¹⁰ E.g., App. Br. 15 n.34 (application of Catholic Social Services of Wayne County); *id.* at 15 (application of Families of the Americas Foundation). In one instance involving Catholic Charities of the Diocese of Arlington (App. Br. 18), appellees recount at length problems with *proposed* curriculum, even though the record shows (J.A. 112-13), and appellees admit that prior to final approval HHS officials contacted the applicant and "obtained assurances" that AFLA funds would not be used to teach the problematic curriculum. App. Br. 19.

¹¹ For example, appellees state that "[t]he government has funded grantees . . . to provide programs that included the 'Biblical and theological views regarding sex,'" (App. Br. 29-30), when in fact the reference in the record is to a Presbyterian church group that requested a presentation from a secular grantee (the Northwest Regional Health Center of Shreveport, Louisiana), which the youth group leader said he would follow "by a brief presentation *by myself* on Biblical and theological views regarding sex." J.A. 568 (emphasis added). Surely it is not a violation of the Establishment Clause for religious groups to educate their own members about the religious dimensions of sexuality.

¹² See, e.g., App. Br. 14 & n.30 (discussing Providence Hospital's "Rainbow" program, although only its secular counterpart, the "Pathways" program, was funded under the AFLA).

¹³ See, e.g., App. Br. 12 n.24 (Maternal and Child Health Program of the State of Hawaii provided "church and counseling based efforts at reaching families"); *id.* at 15 n.34 (Catholic Social Services of Wayne County intended to make presentations to religious groups); *id.* at 11 n.23 (Memorial General Hospital of West Virginia conducted workshops in church facilities for children and their Sunday School teachers).

of religion in the programs;¹⁴ or (6) opposition to abortion or artificial contraception.¹⁵ Very few of appellees' factual assertions point directly to AFLA-funded, "specifically religious" activities designed to "teach or promote religion."

II. The District Court's Severability Ruling Is Correct On Severability Principles But Should Be Reversed On Constitutional Grounds

In its order of August 13, 1987, the district court held that "the AFLA's references to 'religious organizations' are severable from the statute and that the remainder of the AFLA is fully operable as law in a manner consistent with the intent of Congress." U.S. J.S. App. 53a. Appellees took a cross-appeal from this aspect of the judgment. While their argument on severability principles is wholly without merit, we agree on constitutional grounds that the AFLA cannot be enforced in the form it was rewritten by the district court.

If Congress were to pass a statute authorizing grants to private organizations "except those affiliated with religion," the statute would be plainly unconstitutional under the Free Exercise Clause and the equal protection component of the Due Process Clause. While the *conduct* of individuals or organizations is subject to state regulation, the freedom to *believe* is absolute. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Long before this Court first recognized the right of believers to certain exceptions from government practices that burden the free exercise of religion, see *Sherbert v. Verner*, 374 U.S. 398 (1963), the Free Exercise Clause protected individuals and groups from being penalized by the government on account of their religious belief, character, or affiliation. *Davis v. Beason*, 133 U.S. 333, 342-43 (1890); *Reynolds v. United States*, 98 U.S. 145, 166-67

¹⁴ See, e.g., App. Br. 15 & n.32 (Family of the Americas Foundation was "inspired by the Encyclical *Humane Vitae*"); *id.* at 14 n.31 (grantee's description of its "philosophical orientation").

¹⁵ See App. Br. 19-22.

(1879); see *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *id.* at 635 n.8 (Brennan, J., concurring).¹⁶ Organizations may be barred from government programs because they do not comply with the statutory or administrative requirements, but they cannot be barred because they are religious. As rewritten by the district court, the AFLA imposes a stiff financial penalty on organizations for religious affiliation, in plain violation of the Free Exercise Clause.¹⁷

It is far preferable from the point of view of the First Amendment for the federal government to leave the field of sexuality instruction to the private institutions of choice than it is to skew the discussion in favor of non-religious over religious perspectives. If the issues at hand are "inseparable from religious dogma," as the district court concluded (U.S. J.S. App. 36a), it is no solution to say that the government will subsidize only the secular perspective. This is not a subject for which a secular treatment can be said, realistically, to be neutral. A secular orthodoxy about issues of moral and religious import is no less offensive under the First Amendment than a religious orthodoxy.

The district court erred in rewriting the statute to exclude otherwise qualified organizations on the basis of religious affiliation. Unlike Congress's AFLA, which strove to involve the full range of "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. § 300z-5(a) (21)), the district court's rewritten statute explicitly

¹⁶ Indeed, the roots of this principle are older even than the First Amendment. The Constitution's Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." It cannot be that the same Constitution imposes a religious test (in this case, a nonreligious test) in order to be an AFLA grantee.

¹⁷ Alternatively, the violation may be conceptualized as one of the equal protection component of the Due Process Clause. See *McDaniel v. Paty*, 435 U.S. at 643-46 (White, J., concurring).

discriminates on the basis of religious belief and brands some citizens as "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

CONCLUSION

The district court's summary judgment invalidating the AFLA insofar as it involves religious organizations should be reversed. If that judgment is affirmed, then the court's ruling that AFLA funding of only nonreligious organizations may continue should be reversed under the Free Exercise Clause.

Respectfully submitted.

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In the Supreme Court of the United States D

OCTOBER TERM, 1987

Supreme Court, U.S.

FEB 23 1988

OTIS R. BOWEN, SECRETARY OF JOSEPH F. SPANOL, JR.
HEALTH AND HUMAN SERVICES, APPELLANT CLERK

v.

CHAN KENDRICK, ET AL.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**REPLY BRIEF FOR THE FEDERAL APPELLANT
AND BRIEF FOR THE FEDERAL CROSS-APPELLEE**

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-253

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT
v.

CHAN KENDRICK, ET AL.

No. 87-431

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT
v.

CHAN KENDRICK, ET AL.

No. 87-462

CHAN KENDRICK, ET AL., CROSS-APPELLANTS
v.

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.

No. 87-775

UNITED FAMILIES OF AMERICA, APPELLANT
v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT
AND BRIEF FOR THE FEDERAL CROSS-APPELLEE

Introduction

Appellees' responsive brief distinguishes itself among briefs filed with this Court, in two respects.¹ First, although defending the judgment of the district court, the brief is careful to avoid endorsing the legal rationale upon which that court relied. Second, fully half of the brief is devoted to a selective discussion of factual matters—not the facts as found by the court below, but rather selected facts revealed during discovery along with an enormous volume of other, inconsistent material that appellees never mention. These two features of appellees' brief confirm, first, that the reasoning of the district court is indefensible, and, second, that the proper resolution of this case awaits evaluation of a complex factual record, applying the principles enunciated in this Court's Establishment Clause cases.²

A. The District Court Erred in Holding the AFLA Unconstitutional

1. Appellees' factual assertions offer no basis on which to uphold the decision of the district court

Appellees seek to put before this Court, *de novo*, a body of evidence relating to the operation of the AFLA and to the conduct of particular grantees. They ask the Court to consider this material and, having done so, to ratify the constitutional holding of the district court. There are two reasons why the Court should decline to follow such a course. First, the district court's reliance on an unprecedented "direct and immediate" standard for identifying establishments of religion led it to make virtually no factual findings on any of the specific factual

¹ In both respects, however, it has much in common with the amicus briefs filed in support of appellees. No brief in this case has undertaken to support the reasoning of the district court, and most place heavy emphasis on facts as to which there were no findings below.

² Appellees do not dispute our contention (Appellant's Br. 31 n.24) that the district court erred in concluding that appellees have standing as taxpayers to challenge the AFLA as applied. Their possible standing as members of religious ministries (Appellees' Br. 5 n.10) was not addressed by the district court.

matters asserted by appellees. Second, the factual assertions raised at length by appellees are sharply contested. Both sides have submitted proposed findings and have supported those findings with detailed citations to the underlying testimony, affidavits, and exhibits. The Court is in a position to rely on specific factual findings only if it is prepared to make those findings itself.³

For example, appellees quote the testimony of one witness who expressed "surprise[]" (Br. 7-8) at the allegedly "high proportion [of] religious affiliation (30 or 40 percent)" and the "lack of experience" of the grant readers; they do not cite the testimony of the AFLA Director, who explained that she had selected readers based upon their experience and other credentials, and that religious affiliation was not a criterion for selection (R. 111, 106, 110, 119, 141-143, 265). Appellees cite (Br. 8 & n.15 (emphasis in original)) several readers' comments as evidence that the AFLA "was intended to *require* religious indoctrination"; they do not point out that those comments were a tiny fraction of the more than 6000 reader statements (R. 110, 187), that the Director could not recall even having reviewed any particular reader comments in making the actual grant awards (R. 111, 147), or that the Director was not bound by reader comments but instead made the final decisions based upon independent criteria unrelated to religious affiliation (*id.* at 149, 225).

Appellees cite (Br. 10-12) SeMo, Charles Henderson Child Health Center (CHCHC), and Memorial General Hospital Association as examples of secular grantees that were funded to use religious means to achieve AFLA goals; they neglect to cite any of the abundant evidence showing that each of those grantees operated lawful, secular programs, and that they involved religious groups, not in a doctrinal capacity, but as part

³ Although appellees and some of the amici go quite far in inviting this Court to resolve factual disputes present in the record, and as to which the district court has made no findings, amici NOW et al. propose to go a good bit farther. In their "lodging," they ask the Court to evaluate materials that are not even part of the record and that have been gathered and submitted by amici for the first time to this Court. We have referred this material to HHS for its review and for whatever action may be appropriate.

of a broad array of community institutions through which secular services could be transmitted to the public (see, e.g., R. 181 (Campbell decl.) 8-9; *id.* (Little decl.) 7, 11).⁴ While appellees cite certain grant applications as evidence that “secular grantees promoted religion” (Br. 12 & n.24), they do not mention the evidence showing that, in practice, the cited programs were devoid of religious content (see e.g., R. 181, 507006, 507008 (Hawaii program); *id.* at 517041-517122 (Lyon County); *id.* at 511005 (Tucson Unified School District)).

Similarly, appellees’ claim (Br. 12-13) that AFLA programs presented religious material in the public schools turns on snippets wrenched from their context (see R. 181 (Vincent decl.) 7, 11 (University of South Carolina)), and broad mischaracterizations of the record (see, e.g., R. 181 (Forliti decl.) 5, 8-9, 10, 12-13, 17; R. 125, 54-55, 83-85, 118-119, 127-128, 161-162, 167, 174, 177; R. 181 (Olson decl.) 4-11). Appellees cite (Br. 16-17) Catholic Family Services of Amarillo as a grantee that built its AFLA program on a religious base, but they omit the evidence showing that CFS’s policies prohibit the imposition of religious doctrine on clients, and that its AFLA program did not in fact provide religious instruction (R. 181 (Watson decl.) 10, 11, 15, 18, 23).⁵

⁴ Appellees’ assertion (Br. 11) that CHCHC used AFLA funds to promote a “Family Week” and “Family Sunday,” in which pastors were encouraged to inculcate Christian values, is baseless. CHCHC sponsored a “Day of the Family” program, which took place on a Sunday, and ministers were asked to mention the event. That, however, was the only involvement of the clergy in the program. The event was not used to promote Christian values, and no AFLA funds were used to pay for it. R. 181 (Little decl.) 13-15.

⁵ Similar overstatements or misstatements of the record abound. Thus, while appellees assert (Br. 18) that HHS permitted a religious curriculum to be taught in the Boston public schools, a reading of that curriculum shows it to be indisputably secular (R. 181, 711009-711209). Although one of the appellees’ witnesses did assert that the medical care at St. Margaret’s was inappropriate (Br. 21), another witness disputed that claim (J.A. 678). Appellees’ contention that AFLA programs conveyed a link between the government and religion turns on statements taken out of context (see, e.g., R. 181 (Vincent decl.) 10), and incomplete accounts of the record (see, e.g., R. 181, 304029-304051). Appellees’ suggestion (Br. 26 n.57) that one grantee was

Notwithstanding appellees’ allegations to the contrary, the district court manifestly did *not* find that “HHS injected religious bias into the grant-making process” (Br. 7), or that its “funding decisions ensured that religions and religious viewpoints would be advanced” (*id.* at 9). Nowhere in its decision did the trial court find that the government “funded secular grantees to use religious means to achieve AFLA goals” (*id.* at 10), or that “AFLA programs with a distinctly religious slant were presented to public school students” (*id.* at 12). Appellees are likewise unable to locate any findings to support the claims that HHS “funded grantees to build upon existing religious programs” (*id.* at 13), that it “condoned the promotion of religious doctrine” (*id.* at 18), or that AFLA programs have conveyed to the public at large “that the government supports religion” (*id.* at 22). And the district court expressly *rejected* the contention (J.S. App. 13a-15a), renewed nevertheless by the appellees (Br. 26), that the AFLA promotes certain religious denominations at the expense of others.

It remains our view that the task of resolving these factual disputes belongs, in the first instance, to the district court. Some of the disputes turn on credibility judgments; others depend on the weight of sharply conflicting testimony and exhibits. The issue before this Court is to prescribe the appropriate legal standard for evaluating the evidence adduced on both sides. In our view, the district court failed at the legal threshold, and, by virtue of an erroneous legal premise, never made the factual determinations upon which a correct judgment must eventually depend.

rejected because of a Methodist affiliation is mistaken. Indeed, Emory University, which is Methodist affiliated, was one of the AFLA grantees (R. 181, 312004-312005). While one of appellees’ witnesses opined that religious pressure persuaded HHS not to renew the AFLA grant for the University of Arkansas (Br. 31), the AFLA Director testified that the decision was based on other grounds (R. 111, 165-166). And appellees assert (Br. 18) that teenagers at the St. Margaret’s school were taught material “tailored to Catholic theology,” but there is conflicting evidence that a purely secular curriculum was taught at the school (R. 231, 90-92, 111).

2. Appellees have not shown an impermissible effect

As we explained in our opening brief, this Court has articulated a two-prong standard for determining whether government aid has the impermissible effect of establishing religion. “Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting.” *Hunt v. McNair*, 413 U.S. 734, 743 (1973). Because it applied a quite different “direct and immediate” test, however, the district court explicitly refused to conduct either of the inquiries required by *Hunt*.

Appellees apparently do not subscribe to the district court’s novel approach, but they defend the result on three grounds. First, they contend (Br. 32-37) that the AFLA funds specifically religious activity and religious institutions. Second, they argue (*id.* at 37-41 & App. C) that, in any event, the *Hunt* factors do not apply at all where the statute itself imposes “no restriction on the ability of the[] grantees to use federal funds to further their own religious missions.” Third, they argue (*id.* at 41-45) that the inquiry as to the pervasively sectarian character of individual grantees either has been adequately made, or need not be made at all. Appellees are mistaken on all counts.

a. Appellees ask this Court to conclude that AFLA funds are in fact “earmarked” for sectarian activities (Br. 32), thus violating the prohibition against using government money for specifically religious purposes. Throughout their brief (Br. 10, 24-26, 26 n.56, 29-30) appellees argue that the statute promotes religious ends simply by funding services that are consonant with particular religious beliefs, and that any involvement of religious groups in teaching or counselling about matters on which they have religious views – however those services may be carried out – necessarily violates the “effects” test and unlawfully discriminates against other religions whose beliefs are not consistent with the objectives of the statute.

Appellees likewise portray the AFLA program as a clumsy, but deliberate effort to enlist the prestige and resources of the government in the indoctrination of religion. Without citation, appellees depict the AFLA as “a religious crusade against adolescent ‘promiscuity’ and abortion” (Br. 1) that was “intended * * * to convey a message of government endorsement of religion” (*ibid.*). Congress is charged (*id.* at 2) with having intended “to inject religious values and the power of religion into AFLA programs” – a proposition that even the district court could not accept (see J.S. App. 17a-22a).⁶ And appellees repeatedly but misleadingly assert (Br. 2, 2 n.4, 3, 3 n.7) that the AFLA *requires*, not simply permits, grantees to involve religious organizations in the provision of funded services – a legal conclusion which they erroneously ascribe (*id.* at 3 n.7) to the district court,⁷ and in support of which they cite (*id.* at 3) a willfully bowdlerized version of one of the statutory provisions.⁸

⁶ Amici Unitarian Universalist Association, et al. go further and assert (Br. 10-19) that in enacting the AFLA Congress impermissibly discriminated among religions by offering funds only to those groups that were prepared to abide by the statutory restrictions on abortion counseling. The district court correctly rejected that contention (J.S. App. 13a-15a). Unlike the statute invalidated in *Larson v. Valente*, 456 U.S. 228 (1982), the AFLA does not make any “explicit and deliberate distinctions” (456 U.S. at 246-247 n.23) among religious institutions. Rather, it makes funds neutrally available to any group that is prepared to abide by the terms of the statute. The fact that some religious groups, as a matter of faith, cannot, or will not, participate in AFLA programs does not amount to a “denominational preference[] of the sort consistently and firmly deprecated in [the Court’s] precedents” (*id.* at 246 (footnote omitted)). To the contrary, like the “conscientious objector” exemption upheld in *Gillette v. United States*, 401 U.S. 437 (1971), and the Sunday closing law upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961), the AFLA has, at most, a “disparate impact among religious organizations” that “result[s] from application of secular criteria” (*Larson*, 456 U.S. at 246-247 n.23 (citation omitted)). As such, it is constitutionally permissible.

⁷ In fact, the district court correctly construed Section 300z-5(a)(21) of the Act simply to “permit[] the involvement of religious organizations” in AFLA programs (J.S. App. 40a).

⁸ Appellees misquote Section 300z-2(a) through the artful use of ellipsis. In their version, that provision is made to read: “[d]emonstration projects

Insofar as appellees mean to suggest that Congress cannot constitutionally enact programs that embody value judgments that are consonant with the tenets of particular religions, they are plainly wrong. Certainly the Establishment Clause does not invalidate statutory programs on the ground that the actions they direct also further goals of certain religions but not others. To the extent appellees are arguing that the involvement of any religiously affiliated organization in the AFLA program is itself an improper advancement of religion, they are equally incorrect. Outside the unique context of pervasively sectarian institutions, this Court's cases do not justify the extravagant (and possibly unconstitutional) presumption that persons will misuse grant monies simply because they have an affiliation with a particular religion.

Appellees' contrary assertion is not materially strengthened by the fact that, on isolated occasions, some religious allusions may have been made in a small number of AFLA programs. Aberrational examples do not amount to "specifically religious activity" under the Establishment Clause (see, e.g., *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 758 (1976)), and, in any event, the trial court made virtually no findings on any of the factual allegations reproduced by appellees. Beyond that, even if a small number of programs were constitutionally infirm—a determination that must await a detailed consideration of all of the evidence bearing on each of the individual grantees—that could hardly justify a facial invalidation of the statute.

b. Appellees next claim that, in any event, the statute is unconstitutional because it does not contain an explicit prohibition on the use of funds for sectarian purposes. Such a conclusion is

shall . . . make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations" (Br. 3 (emphasis in original)). This expedient use of ellipsis spares the reader the burden of dealing with the more complex—and very different—language that actually appears in the statute. The statute does *not* say that projects shall make use of support systems such as religious groups, but rather that they "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems," including religious organizations.

unwarranted. The AFLA contains clear directives on how grants are to be used, and none of the statutory objectives involves religious indoctrination or other sectarian uses. The fact that the AFLA (or any other statute) does not expressly forbid the use of funds for unconstitutional purposes cannot be dispositive. It is certainly not reasonable to infer that Congress intended either to authorize uses different from the ones it explicitly provided for, or to allow the authorized functions to be carried out in a manner inconsistent with the Establishment Clause.

Bradfield v. Roberts, 175 U.S. 291 (1899), makes clear that a federal statute does not violate the Establishment Clause simply because it lacks a clause expressly forbidding the use of funds for religious purposes. In that case, a federal statute authorized building funds to be paid to a hospital previously incorporated "for the care of such sick and invalid persons as may place themselves under treatment and care of said corporation" (175 U.S. at 292). Although it assumed that the hospital was operated under the auspices of the Catholic Church and by members of a Church order, the Court found no constitutional infirmity in light of the statute's secular objectives. While "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the Court observed, "its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence" (*id.* at 298). The Court did not insist on a specific provision prohibiting religious use of the appropriated funds. Rather, it relied on the charter of the hospital itself, whose "specific and limited object" was "the opening and keeping [of] a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation" (*id.* at 299-300).⁹

⁹ Appellees assert that *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality opinion), "insist[s] on statutory safeguards" (Br. 39 (emphasis in original)), but nothing in the decision stands for that proposition. Moreover, the infirmity in the statute in *Tilton* was that the specific prohibition on religious use was limited to 20 years, suggesting that thereafter the religious institutions could devote buildings built with government funds to religious instruction or

Moreover, in administering the statute, the Secretary has incorporated in every grant award since 1984 (which includes all presently funded projects) an explicit prohibition on religious indoctrination. See J.A. 757, 759, 761. In light of that administrative practice, it cannot possibly make a difference of constitutional proportions that the statute itself lacks a similar prohibition. The effects test focuses on the risk that funds will be channeled to sectarian purposes. It should make no difference whether a grantee is instructed by the Secretary to eschew religious indoctrination, or is so directed by the statute itself. Indeed, there are good reasons to believe that administrative oversight is more likely to ensure compliance with such strictures than the simple fact that the governing statute contains a restrictive clause. Individual grantees must deal with an administrator when they initially apply for a grant, when they receive their funding, and when they seek a renewal of the grant. That relationship is far more likely to deter abuses in the program than the simple presence of a prohibitory clause in the statute. Not surprisingly, this Court has consistently looked not only to the statute itself but also to provisions for administrative oversight in assessing the risk that government funds will be devoted to sectarian ends. See, e.g., *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 741-743, 760-761 & n.22 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 739-740, 744-745 (1973); *Tilton v. Richardson*, 403 U.S. 672, 675, 680 (1971) (plurality opinion).¹⁰

worship (see 403 U.S. at 683). By contrast, the AFLA imposes a continuing obligation to use the appropriated funds for the secular purposes articulated in the statute.

¹⁰ Appellees insist (Br. 39) that the prohibition in the grant awards on "teaching or promotion of religion" is too narrow to ensure secular use of AFLA funds. We see no meaningful difference between that formulation and the statutory prohibitions approved by this Court in *Tilton* (see 403 U.S. at 675), *Hunt* (see 413 U.S. at 736-737), or *Roemer* (see 426 U.S. at 740-741). This Court has generally assumed that grantees will act in good faith and "give a wide berth" to grant restrictions, in order to "minimize constitutional questions" (*Roemer*, 426 U.S. at 760 (footnote omitted)). There is no reason to depart from that presumption in the present case.

c. Appellees turn, finally, to the question that the district court should have addressed at the outset, but never did—whether AFLA funds have "flow[ed]" to pervasively sectarian institutions (*Hunt*, 413 U.S. at 743). They seek to deal with that question in two ways. First, they propose their own findings of fact (Br. 42-44)—claiming that at least three AFLA grantees were pervasively sectarian—and ask this Court to ratify those findings as if they had issued from the district court. Second, appellees contend that it is not necessary under this Court's cases to decide whether individual grantees are pervasively sectarian, because no such "detailed itemization" has been required under this Court's cases (*id.* 45), and because the mere possibility that pervasively sectarian institutions *could* be funded under the AFLA is enough to invalidate the statute (*ibid.*).

Except in passing, the trial court failed to consider the sectarian nature of individual grantees, and it did not identify a single grantee, sub-grantee, or unpaid participant in an AFLA program that it found to be pervasively sectarian.¹¹ Appellees ask this Court to make its own findings, at least with respect to three AFLA grantees. That task obviously belongs to the trial court in the first instance, since the underlying facts remain sharply in dispute. Moreover, even were three of the AFLA grantees pervasively sectarian, that would hardly justify the conclusion that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, No. 86-87 (May 26, 1987), slip op. 5.

¹¹ Appellees make an unavailing effort (Br. 43 & n.88) to locate findings in the district court opinion concerning the extent to which individual grantees were pervasively sectarian. The selected quotations demonstrate that the court regarded the entire inquiry as irrelevant in light of the "direct and immediate" standard. Typical of the district court's "findings" on this issue is the following remark (J.S. App. 33a (quoted in Br. 43 n.88)): "While the Court will not engage in an exhaustive recitation of the record, references to representative portions of the record reveal the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, or permitted the use of tax dollars for education and counseling that amounts to the teaching of religion."

Appellees next contend that the “pervasively sectarian” inquiry is unnecessary, because “this Court has never required such a detailed itemization” (Br. 45), and because the mere possibility that a pervasively sectarian institution *might* be funded is sufficient to strike down the AFLA on its face (*ibid.*). But this Court has indeed insisted on a detailed, case-by-case inquiry, explaining that in order “[t]o answer the question whether an institution is so ‘pervasively sectarian’ that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements” (*Roemer*, 426 U.S. at 758). See *id.* at 755-758; *Hunt*, 413 U.S. at 743-744; *Tilton*, 403 U.S. at 680.¹² Accordingly, the mere possibility that a grant program involving religious organizations *may* be misdirected “cannot, standing alone, warrant striking down a statute as unconstitutional” (*Tilton*, 403 U.S. at 679). As a plurality of this Court explained in the *Roemer* case, “[i]t has not been the Court’s practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds” (426 U.S. at 761).

3. Appellees have not shown excessive entanglement

We demonstrated in our opening brief that the district court’s failure to consider the sectarian nature of the individual AFLA

¹² Appellees read (Br. 45) *Meek v. Pittenger*, 421 U.S. 349 (1975), as authority for the proposition that the sectarian nature of individual grantees, or even the grantees as a whole, need not be established with the usual rigor required when a finding has constitutional implications. The case says no such thing. In striking down programs that provided teaching material and auxiliary services to nonpublic elementary and secondary schools, the Court observed that “more than 75%” of the schools were church-related or religiously affiliated and had a “predominant[ly] sectarian character” (421 U.S. at 364 (footnote omitted)). The Court explained (*id.* at 366) that “the primary beneficiaries” of the programs “typify * * * religion-pervasive institutions,” and held (*ibid.*) that “[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.” Plainly, no such findings have been, or, we contend, could be made, in the present case.

programs fatally impairs its decision on entanglement. That is true, we contended, for two reasons: first, because outside the context of pervasively sectarian institutions, monitoring by the government to ensure compliance with the terms of a grant is simple monitoring, not entanglement; and second, because only pervasively sectarian institutions are likely to require the extensive degree of monitoring that this Court has held to be constitutionally impermissible. Accord *Florey v. Sioux Falls School Dist.* 49-5, 619 F.2d 1311, 1318 (8th Cir.), cert. denied, 449 U.S. 987 (1980).

Appellees do not dispute, nor could they, the fact that the sectarian nature of a grantee is a “critical element[]” of the entanglement inquiry. *Aguilar v. Felton*, 473 U.S. 402, 412 (1985). Moreover, while appellees are surely correct in observing that “the degree of sectarianism of an institution is to be considered ‘cumulatively’ ” with other factors (Br. 46 (citation and emphasis omitted)), it does not follow that where there is no pervasively sectarian institution a finding of entanglement is nonetheless possible. Indeed, appellees do not point to any case in which this Court has found excessive entanglement outside the context of a pervasively sectarian institution. And appellees are further stymied by the fact that the district court did not even attempt to make findings on the sectarian characteristics of the grantees, so that a “cumulative” analysis of the individual grantees could be undertaken.

As before, appellees ask this Court to do the work of the trial court. They argue, for example, that “[t]he degree of sectarianism of an institution must be assessed in light of its religious tenets governing the aid at issue” (Br. 47), and they proceed to make a series of assertions about the sectarian characteristics of particular AFLA participants. It is these very assertions, however, that the litigation is about, and which the trial court found it unnecessary to resolve.¹³

¹³ Appellees’ assertion (Br. 51-53) that the AFLA has proved to be “political[ly] divisive[]” is unavailing, in light of this Court’s holding in *Mueller v. Allen*, 463 U.S. 388, 403-404 n.11 (1983), that that concern “must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.”

B. The References in the AFLA to Religious Organizations, if Unconstitutional, Were Correctly Held to be Severable from the Other Provisions of the Act

If the Court concludes that the AFLA is unconstitutional insofar as it refers to "religious organizations," we believe that the district court's decision severing those references from the balance of the Act should be affirmed. A court should refrain from invalidating more of a statute than is necessary. " ' Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Alaska Airlines, Inc. v. Brock*, No. 85-920 (Mar. 25, 1987), slip op. 5 (citations omitted). Accord *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *INS v. Chadha*, 462 U.S. 919, 931-932 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). " ' [W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid' " (*Alaska Airlines*, slip op. 5 (citations omitted)). The district court correctly concluded (J.S. App. 52a-54a) that the references in the AFLA to "religious organizations" are severable from the balance of the statute.

I. Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 101, 108 (1980). Here, the language of the AFLA leaves no doubt that absent the references to "religious organizations," the balance of the statute is assuredly "legislation that Congress would * * * have enacted" (*Alaska Airlines*, slip op. 7).¹⁴

¹⁴ Although there is no severability clause in the AFLA, that fact "does not raise a presumption against severability" (*Alaska Airlines*, slip op. 7). Accord *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion); *United States v. Jackson*, 390 U.S. 570, 585 n. 27 (1968). For reasons that are difficult to fathom, cross-appellants regard the absence of a severability clause as

The AFLA refers to "religious organizations" only four times (see 87-431 J.S. App. 53a; Appellant's Br. 3-4).¹⁵ Two of those references appear in congressional findings that simply state that the problem of adolescent pregnancy is best addressed through a wide array of institutions—including, but not limited to, religious organizations. See 42 U.S.C. 300z(a)(8)(B), and 300z(a)(10)(C).¹⁶ Although those findings (taken in conjunction with the many other findings articulated in the statute, see generally 42 U.S.C. 300z), generally identify the concerns that persuaded Congress to enact the legislation, the findings have no independent operational significance. Thus, if the findings were stripped of their passing references to "religious organizations," the remaining statute would obviously "function in a manner consistent with the intent of Congress" (*Alaska Airlines*, slip op. 6 (emphasis in original)). Cf. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) (findings expressed in Developmentally Disabled Assistance and Bill of

evidence that "Congress intended religion to be an inseparable part of the AFLA" (Br. 59 n.118).

¹⁵ Those four isolated references are a far cry from appellees' assertion (Br. 58 n.117) that "[t]he inclusion of religious organizations is interwoven throughout the AFLA."

¹⁶ Section 300z(a)(8)(B) provides in part:

The Congress finds that [the problems of adolescent premarital sexual relations, pregnancy, and parenthood] * * * are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

Section 300z(a)(10)(C) provides in part:

The Congress finds that * * * services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.

Rights Act, 42 U.S.C. (1976 ed. & Supp. III) 6000 *et seq.*, "represent general statements of federal policy, not newly created duties".

The third reference to "religious organizations" appears in 42 U.S.C. 300z-2(a), which provides that "[d]emonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations." This provision makes no reference to the participation of religious organizations in AFLA programs; rather, it states that funded projects shall use methods that enhance "the capacity of families" to draw on "support systems," including, but not limited to, religious organizations. "With this subsidiary role allotted" to religious organizations in Section 300z-2(a) (*Alaska Airlines*, slip op. 9), it cannot be supposed that Congress would have declined to enact the statute had it known that this incidental reference to "religious organizations" would be struck down. See pp. 7-8 & n.8, *supra*.

The fourth and final reference to "religious organizations" appears in Section 300z-5(a)(21)(B), which is the only provision in the entire AFLA that actually indicates that religious organizations may themselves participate in funded programs. Section 300z-5(a)(21)(B) provides that applications for AFLA grants shall include "a description of how the applicant will, as appropriate in the provision of services * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." In two respects, the language confirms that Congress would have enacted the balance of the statute without this final reference to "religious organizations." First, prospective grantees are not *obligated* to involve religious organizations; they need only describe how they intend to involve those organizations "as appropriate." Accord R. 111, 19-21.¹⁷ Second, religious organizations are included—as they

¹⁷ Relying on the district court opinion and on a Senate Report, cross-appellants contend that under Section 300z-5(a)(21) "grantees do not have a

are elsewhere (see 42 U.S.C. 300z(a)(8)(B), 300z(a)(10)(C), 300z-2(a))—as only one among "a wide array of educational, health, and supportive services" (42 U.S.C. 300z(a)(9)) whose combined efforts were required to deliver care and prevention services to adolescents in need. There is no reason to believe that Congress would have rejected the AFLA had it known that one aspect of that "wide array" would later be declared unconstitutional.¹⁸ As a plurality of this Court observed in *Tilton v. Richardson*, 403 U.S. at 684 (footnote omitted), "[i]n view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect."¹⁹

choice about whether to involve religious organizations" (Br. 3 n.7). Neither authority supports that conclusion. Indeed, the district court correctly construed Section 300z-5(a)(21) simply to "permit[] the involvement of religious organizations" (J.S. App. 40a). And while there is some passing language in the 1984 Senate Report accompanying the re-authorization of AFLA funding (S. Rep. 98-496, 98th Cong., 2d Sess. 9-10 (1984)) suggesting that religious groups are required to be included in the program, the Conference Committee made clear that this Report should "not be considered as legislative history for the purposes of interpreting * * * the intention of the Congress with regard to * * * the Adolescent Family Life Act." H. R. Conf. Rep. 98-1154, 98th Cong., 2d Sess. 3 (1984).

¹⁸ The Court has explained that where the valid remainder of a statute is "fully operative as a law" the invalid provision "is further presumed severable" (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234). The district court correctly determined (87-431 J.S. App. 54a) that "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.' "

¹⁹ In other Establishment Clause cases, the Court has refused to sever unconstitutional provisions only where the lawful portions of the statute were so "minor" that it could not be "assume[d] that the [legislature] would have passed the law solely to provide such aid." *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975). Accord *Sloan v. Lemon*, 413 U.S. 825, 833-834 (1973) (footnote omitted) (where "so substantial a majority" of the beneficiaries of state funding program were pervasively sectarian, "it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools").

2. The legislative history of the AFLA confirms the lesson of the text. As the district court explained (87-431 J.S. App. 54a), religious organizations were mentioned in the legislative history only once and, even then, only in the context of a broader discussion of the need for "community involvement" in AFLA programs. S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981). The Senate Report makes clear that "[r]eligious affiliation is not a criterion for selection as a grantee" (*id.* at 16). Rather, the Report emphasizes, religious organizations are included in the statute as "a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents" (*ibid.*).

The fact that Congress substituted the AFLA for the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Tit. VI, 92 Stat. 3595, and added, *inter alia*, an explicit reference in the statute to religious organizations, does not change the analysis. As we explained in our opening brief (at 23-24), and as the district court found (J.S. App. 21a), the AFLA amended Title VI to add references not only to religious organizations but also to "families, charitable organizations, voluntary associations, and other groups" (*ibid.*). Religious organizations were to be only one among many participants in AFLA programs; and there is utterly no evidence to support cross-appellants' assertion (Br. 58) that "[a] primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values." Cross-appellants have not carried the considerable burden of showing that it is "evident that the Legislature would not have enacted" the balance of the AFLA without the references to religious organizations.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the district court declaring the AFLA unconstitutional "insofar as the statute involves 'religious organizations'" (J.S. App. 46a) should be reversed. If the Court affirms that judgment, however, the further judgment of the district court severing those references from the balance of the statute should be affirmed.

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FEBRUARY 1988

FILED

MAR 4 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

CHAN KENDRICK, et al.,

Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,

Cross-Appellee.

UNITED FAMILIES OF AMERICA,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CROSS-APPELLANTS' REPLY BRIEF

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I. THE SEVERABILITY ISSUE IS PROPERLY BEFORE THIS COURT

The undisputed facts presented in appellees' main brief make plain that the excision of the references to religious organizations in the AFLA would fundamentally alter the remaining provisions of the statute and the experimental purpose of this demonstration Act. Furthermore, the undisputed record reveals that the mandate for religious involvement and the promotion of religious beliefs permeates the entire administration and operation of the Act, indicating that HHS itself viewed the role of religious organizations as central to the legislation, consistent with the clear legislative intent. And finally, the facts revealed that the HHS Notice of Grant Award condition prohibiting the "promotion of religion" did not in fact provide any assurance that federal taxpayer dollars would not be used to advance religion, and therefore only a new "AFLA," which only *Congress* has the power to rewrite, could ensure the constitutionality of the Act.

Faced with the overwhelming and uncontested record, appellants respond by suggesting that it is premature for this Court to reach the severability issue.¹ They argue that "proper resolution of this case awaits evaluation of a complex factual record," Gov. Reply Br. 2, and that a remand is necessary before this Court can review the district court's orders, including its order on severability. As appellees will demonstrate, these claims are without merit.

Although the government seems to go back and forth on whether the extensive facts presented by appellees about the

¹ Appellees have standing to challenge the district court's severability decision as well as the statute itself. The government attempts to challenge standing in two footnotes, Gov. Br. 31 n. 24, Gov. Reply Br. 2 n.2, despite the district court's ruling, J.S. App. 8a-12a, and this Court's ruling in *Flast v. Cohen*, 392 U.S. 83 (1968), left unchanged as to Establishment Clause cases by *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Their claim that *Valley Forge* precludes appellees' as applied challenge is clearly wrong in light of *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar* this Court upheld an as applied challenge under the Establishment Clause to Title I, 92 Stat. 2153, as administered by New York State. *Id.* at 407.

original AFLA grantees are even relevant,² the government now demands complete fact-finding on all grantees past and present.³ The government claims that such determinations are necessary to establish whether there is a sufficient but unspecified quantity of “pervasively sectarian” grantees or “specifically religious activiti[es],” to justify the district court’s conclusion that references to religious organizations must be severed and a prohibition of funding religious grantees written in. Gov. Reply Br. 8, 13. Appellants also claim that it would not be appropriate for this Court to make the additional factual determinations appellants view as necessary. *Id.* at 3, 11; Int. Reply Br. 4.

Although they filed cross-motions for summary judgment, appellants now further argue that summary judgment was not appropriate. See Gov. Reply Br. 5. However, under the well-

² See Gov. Br. 33 n.26: “Unfortunately, the present record does not now permit such an individualized analysis, because all but one of the religiously affiliated groups analyzed by the district court are no longer receiving federal funds.” The government’s memorandum of points and authorities on summary judgment stated: “Moreover to the extent that plaintiffs rely on past administration of the Act or to grantee activities no longer occurring, such issues are irrelevant to the current administration.” R. 181, Br. 3 n.1. In contrast, the government’s reply brief discusses the need for an evaluation of “a complex factual record,” apparently referring to the evidence on the 1981 and 1982 grantees presented in the district court. Gov. Reply Br. 2.

³ Unlike any other Establishment Clause case before this Court, this case involves grantees in over 40 states; this would require multiple depositions for each grantee and sub-grantee in forty different states from Pennsylvania to Alaska. Since HHS had little or no information or evidence about most of its grantees, appellees were forced to engage in an extensive discovery effort. See R.130, 3-8; R.126, 9-15; R.127; J.A. 745 (OAPP “does not require grantees to report the information about subgrant and subcontract arrangements”). Appellees’ facts were based on four sets of interrogatories, three requests for production of documents and twenty-seven depositions of AFLA grantees and HHS officials. Since grantees were not parties to this suit, testimony had to be obtained by deposition subpoenas issued by federal district courts in the states where the non-party witnesses lived, and appellees even had to file a collateral appeal to the Fifth Circuit in order to obtain discovery material on one grantee. *Kendrick v. Heckler*, 778 F.2d 253 (5th Cir. 1985). The government’s argument about the necessary fact-finding, if accepted, would set a precedent that would make the cost of Establishment Clause litigation prohibitive.

established legal standards governing summary judgment, the district court properly rested its constitutional determination on a record in which all material facts were undisputed. Furthermore, this Court has both the authority and the obligation to review the record and affirm that determination.

Rule 52(a) of the Federal Rules of Civil Procedure expressly makes factual findings unnecessary on summary judgment: “Findings of fact . . . are unnecessary on decisions of motions under Rules 12 and 56 or any other motion except as provided in Rule 41(b).” This is because only questions of law are presented on motions for summary judgment. See, e.g., *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *International Ass’n. of Machinists v. Texas Steel Corp.*, 538 F.2d 1116, 1119 (5th Cir. 1976), cert. denied, 429 U.S. 1095 (1977). In considering cross-motions for summary judgment in this case, the district court carried out its duty to determine whether there existed any genuine issue as to any material fact. Fed. R. Civ. P. 56. J.S. App. 7a-8a. The court’s proper role, contrary to appellants’ novel suggestions, e.g., Gov. Reply Br. 2, 5, 11; Int. Reply Br. 3, 4, 6, is to review the record for any *genuine* factual disputes between the parties, *not* to resolve any existing disputes by making factual findings. *Anderson v. Liberty Lobby, Inc.*, 91 L. Ed. 2d 202, 212 (1986). As this Court stated, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [when] he is ruling on a motion for summary judgment” *Anderson*, 91 L. Ed. 2d at 216.

Although not required to do so, see 6 J. Moore, W. Taggart & J. Wicker, *Moore’s Federal Practice* ¶ 56.02[11] (2d ed. 1987), the district court in this case described the reasons why it concluded that there was no genuine factual issue in dispute:

It is evident from the extent of the record in this case and from the motions themselves that the parties have had more than ample opportunity to submit all material pertinent to a motion for summary judgment. . . . After carefully and exhaustively considering the motions, the statements of material facts not in dispute, the allegations of disputed facts, the golconda of documents submitted to

the Court, and the case law, the Court finds that the material facts are not in dispute and that summary judgment is appropriate.

J.S. App. 7a-8a. The court went on to set forth examples of facts that it found to be undisputed about no less than eighteen participants in AFLA programs. *Id.* at 33a-38a.⁴

By stressing the need for new findings of fact, appellants may be arguing that summary judgment is inappropriate because material facts are disputed.⁵ Yet the government itself stated in its motion for summary judgment that “[t]he parties are in agreement on certain basic facts, such as the fact that grants were made to religiously-affiliated institutions. . . . Where basic facts are undisputed and only ultimate facts are at issue, summary judgment is appropriate.” R. 181, Br. 3 n.1.⁶ The government claimed to dispute a relatively small number of the facts, but, as the district court explicitly found, the government did not properly controvert most of those facts in accordance

4 Several appellate courts have reversed district courts that offered absolutely no indication of their basis for granting summary judgment. See, e.g., *Myers v. Gulf Oil Corp.*, 731 F.2d 281 (5th Cir. 1984) (sixty-five word order gave no basis for decision). Significantly, appellants’ complaint is *not* that the district court inadequately explained its reasons for granting summary judgment; rather, they object that the court did not make detailed findings of fact, which is not required on summary judgment.

At least one court has stated that “it would be ill advised” for a district court to make specific findings on summary judgment because “[t]hey would carry an unwarranted implication that a fact question was presented.” *A.R., Inc. v. Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962).

5 The intervenor argues in its reply brief that the facts cited in appellees’ brief are “wholly immaterial.” Int. Reply Br. 14. Appellees’ facts might very well be immaterial if the intervenor’s theory of the First Amendment were the law, which it clearly is not. The intervenor argues that severability would be inappropriate here because Congress would be constitutionally required to include religious organizations among those it funded to teach and counsel adolescents on issues of sexuality as long as Congress chose to fund any organizations to provide instruction or advice on this issue. Int. Reply Br. 16-18.

6 Similarly, the intervenor did not dispute appellants’ facts submitted in the district court, but only challenged their legal significance under the Establishment Clause analysis. R. 162, Br. 6-9.

with Rule 56(e). J.S. App. 32a n.14.⁷ Of the 1251 facts submitted by appellees, the government properly disputed only 36, leaving undisputed 97.8% of appellees’ facts. J.A. 619; see J.S. App. 32a n.14.⁸ Appellants may not dispute before this Court any fact that they failed to show was disputed in the district court.⁹ See, e.g., *Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146, 150 (5th Cir. 1979) (“It is almost axiomatic that any genuine issue of fact must somehow be shown to exist at the district court level.”). Even at this late date, appellants do not “dispute” any of the facts that were uncontested and presented to the district court.¹⁰

7 Rule 56(e) of the Federal Rules of Civil Procedure clearly states, and this Court recently reaffirmed, that “a party opposing a properly supported motion for summary judgment ‘may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.’” *Anderson*, 91 L. Ed. 2d at 212 (emphasis added).

8 Appellees’ facts were presented in a three-volume four-hundred page statement of undisputed material facts cross-indexed to a seven-volume 3,702-page appendix. This evidence consisted primarily of documentary evidence and depositions. Because a large portion of the depositions were of grantee witnesses over 100 miles from the courthouse, the court on remand would be confronted with the same evidence on the basis of which it already found no material dispute. Fed. R. Civ. P. 45(d)(2).

9 “[F]or an appellate court to permit appellant to assert on appeal a fact issue not raised in the trial court is destructive of orderly procedure and undermines the utility of Rule 56.” Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 493 (1984); see also *Founding Church of Scientology v. Smith*, 721 F.2d 828, 831 (D.C. Cir. 1983) (“Plaintiff has not contested this finding on appeal, nor indeed did it dispute the . . . evidence of sensitivity during the summary judgment proceedings in District Court.”); *Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 101 n.3 (3rd Cir.) (“The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court.”), cert. denied, 429 U.S. 860 (1976).

10 Referring to the record readily establishes that not a single example in the government’s reply brief constitutes an actual dispute. See Gov. Reply Br. 3, 4 n.5. For example, our reference to CHCHC’s “Family Sunday” was hardly “baseless.” *Id.* at 4 n.4. On the contrary, affiant Little admitted it was part of their application, but stated it “has not occurred.” R. 181, Little Decl. ¶ 13. Instead, it was replaced by a “Day of the Family” which always

Moreover, appellees produced undisputed evidence of actual advancement of religion to a greater degree than any other Establishment Clause case reviewed by this court.¹¹ Even if the government had disputed 80% of plaintiffs' facts instead of 3%, the government still would have had to have shown that the resolution of facts in their favor would have changed the outcome

occurs on a Sunday. Contrary to the government's assertion, Little admits that AFLA funds were used to promote the event. *Id.* at ¶ 14. And ministers were not merely "asked to mention the event," Gov. Reply Br. 4 n.4, but rather "announce[d] the Day of the Family program at their Sunday services" and "delivered a message on the importance of the family." R. 181, Little Decl. ¶ 13. The government also attempts to create factual disputes by mischaracterizing appellees' position. Thus, the government alleges a dispute over whether medical care at St. Margaret's was "inappropriate." Gov. Reply Br. 4 n.5. Yet our affiants' allegations were hardly so vague. Rather, Dr. Laz precisely stated that care at St. Margaret's is dictated by religious directives, which prohibit doctors from "performing, prescribing, recommending or even referring for sterilization, abortion or contraception." J.A. 527. The government's affiant disputes neither claim, and in fact concedes that care is given "within the guidance of the religious directives." J.A. 678. Finally, the government alleges factual disputes where plainly none exist. We allege, for example, that Lyon County held several classes at churches and parochial schools. The government counters by citing to over 80 pages of documents—none of which dispute our claim. Gov. Reply Br. 4. As in the district court, the government's "disputes" are "unsupported disagreements," or "reference[s] to the page in the multi-volume record at which the Court [can] look up an undescribed disagreement and decide for itself whether the effort [is] worthwhile." J.S. App. 32a n.14.

11. This Court has invalidated statutes under the "effects" test nine times since 1971 and in none of these cases, even where the statute had been implemented, were any findings made that the federal or state money had actually been directly used to teach religion, faith or morals or advance the particular religious mission of a religious grantee. See *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Larkin v. Grendel's Den Inc.*, 459 U.S. 116 (1982); *Wolman v. Walter*, 433 U.S. 229, 248, 254 (1977) (section on loans of instructional materials and section on field trips); *Meek v. Pittenger*, 421 U.S. 349, 365 (1975) (invalidating section on instructional materials); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (one section invalidated); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

of the case. Because of the cumulative nature of appellees' facts, the government could not have met this burden.

Appellees are not, as the government claims, proposing our "own findings of fact . . . and ask[ing] this Court to ratify those findings as if they had issued from the district court." Gov. Reply Br. 11; see also Int. Reply Br. 4. Rather, in order to assist this Court, we described some of the numerous *undisputed* facts that were established in the district court and are contained in the record. An appellate court reviewing a grant of a summary judgment motion applies the same standard as that applied by the trial court: "*[T]he reviewing court should evaluate the record* on an appeal from a summary judgment" in order to determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 643 (1983) (quoting Fed. R. Civ. P. 56(c)) (emphasis added); see also *Anderson*, 91 L. Ed. 2d at 211-12 (applying this standard).¹² Thus, the district court's orders, both on summary judgment and severability, are properly before this Court, and remand is not appropriate.

II. THE DISTRICT COURT ACTED IMPROPERLY IN REWRITING THE AFLA

In keeping with cardinal principles of separation of powers, the judiciary is charged with enforcing the Constitution to its limits and the legislature with writing laws that conform to those limits. The district court properly found that the AFLA does not conform to the requirements of the Establishment Clause. Attempting, however, to "refrain from invalidating more of the [AFLA] than is necessary," the district court severed out the AFLA's references to religious organizations. Cr.

12. Where a trial court has chosen to make determinations as to which facts are undisputed, such findings are not protected by the "clearly erroneous" rule on appellate review. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2575, at 693 (1971). "The district court's order granting a summary judgment motion is not a discretionary decision and thus will be independently reviewed by the appellate court." *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985) (citing *Federal Deposit Ins. Corp. v. Dye*, 642 F.2d 837, 841 (5th Cir. Unit B 1981)).

J.S. App. 3a.¹³ Recognizing, however, that mere severance was not enough to ensure constitutionality, the court rewrote¹⁴ the statute by prohibiting funding to “religious organizations” as defined in the court’s opinion, federal statutes and regulations, and by the government itself. Cr. J.S. App. 6a-7a.¹⁵ The AFLA’s language, its legislative history, and the “undisputed record” of six years of unconstitutional government sponsorship of religion establish beyond a doubt that rewriting the AFLA in this way was contrary to legislative intent. Congress, and not the courts, has the power to write a new statute, if it so desires, to replace the AFLA. “[I]t is for Congress to determine the proper manner of restructuring the [invalidated statute] . . . in the way that will best effectuate the legislative purpose.” *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982).¹⁶

This Court has long held that courts may not rewrite legislation by inserting statutory limitations in order to cure statutory defects. As explained in *Hill v. Wallace*, 259 U.S. 44 (1922), a statute is nonseverable if it requires “inserting limitations it does not contain. This is legislative work beyond the power and

13 Citations to the district court’s order will be to the Appendix of Appellees’ Jurisdictional Statement in the form “Cr. J.S. App.”

14 The intervenor states at three separate points in two pages of its reply brief that the district court rewrote the AFLA by severing the Act. Int. Reply Br. 16-17. Given this, we do not understand, nor does the intervenor explain, why its opposition to severability is limited to constitutional grounds. *Id.*

15 Only by willful misinterpretation can the intervenor suggest that the injunction applies to organizations “solely on the basis of religious belief or affiliation.” Int. Reply Br. 1 (emphasis added). The court’s ruling on the Rule 59(e) motion makes clear that to be disqualified, organizations must have a religious character that would create the risk of an establishment clause violation as defined in the district court’s opinion and the Supreme Court opinions cited therein.

16 See also *Califano v. Westcott*, 443 U.S. 76, 94-95 (Powell, J., concurring in part and dissenting in part) (“[The Court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than . . . rewriting [the statute], we should leave this task to Congress.”), *aff’d on rehearing*, 443 U.S. 901 (1979).

function of the court.” *Id.* at 70, cited in *Alaska Airlines, Inc. v. Brock*, 94 L. Ed. 2d 661, 669 (1987). The Court concluded that this “would be to make a new law, not to enforce an old one. This is no part of our duty.” 259 U.S. at 71 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). “[C]ourts addressing questions of severability should be guided by Chief Justice Taft’s admonition ‘that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitations.’” *Regan v. Time, Inc.*, 468 U.S. 641, 664 n.2 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting *Yu Cong Eng. v. Trinidad*, 271 U.S. 500, 518 (1926)).¹⁷

III. REWRITING THE AFLA WOULD BE CONTRARY TO CONGRESSIONAL INTENT

This Court in *Alaska Airlines* described the “relevant inquiry in evaluating severability” as “whether the statute will function in a *manner* consistent with the intent of Congress.” 94 L. Ed. 2d at 670 (emphasis in original).¹⁸ The resulting statute must be “legislation that Congress would . . . have enacted.” *Id.* If it is unclear whether Congress would have enacted a statute absent the severed provisions, “then the statute must fall.” *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909); accord *Butts v. Merchants & Marine Transp. Co.*, 230 U.S. 126, 137 (1913). This Court has also stated that when the unconstitutional and constitutional portions of a statute “are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause. When there is no such connection and depen-

17 See also *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) (“[W]e cannot judicially rewrite the Texas statutes and rules to incorporate the [constitutionally required] safeguards.”); *United States v. McElroy*, 259 F.2d 927 (D.C. Cir. 1958) (citing “numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted”), *aff’d*, 361 U.S. 281 (1960).

18 See also *City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987) (“[T]he ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function in a *manner consistent with Congressional intent*.”) (emphasis in original).

dency the Act will stand" *Huntington v. Worthen*, 120 U.S. 97, 102 (1887) (emphasis added).¹⁹

"Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive." Gov. Reply Br. 14 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The language of the AFLA leaves no doubt that Congress would *not* have enacted the AFLA absent the inclusion of religious organizations and that a severed AFLA would *not* operate in a manner consistent with Congressional intent. Congress discussed "religious organizations" at four separate points throughout the AFLA—twice in the congressional "findings and purposes" describing why Congress enacted the AFLA and twice in operational sections of the statute making religious organizations eligible for direct funding and requiring all grantees to include religious organizations in their funded programs. See Appellees' Br. 2-4. The placement and content of the four provisions at issue establish extensive "connection and dependency," *Huntington*, 120 U.S. at 102, between the references to religious organizations and the remainder of the statute, thus rendering the AFLA nonseverable.

The government's suggestion that the references to religious organizations in the congressional findings are not relevant to the severability determination, Gov. Reply Br. 15, is incredible given that Congressional intent controls whether a statute is severable. As the government itself states, the function of the congressional findings is to "identify the concerns that persuaded Congress to enact the legislation." *Id.*²⁰ The congres-

19. Accord *Hill v. Wallace*, 299 U.S. 44, 70-72 (1922) (refusing to sever unconstitutional portions of a statute despite existence of a severability clause because invalid provisions were so interwoven with remaining Act); *Field v. Clark*, 143 U.S. 649, 695-96 (1892).

20. "A *forsore* congressional purpose or declaration of policy set out in the preamble of a statute provides a sound and thoroughly acceptable basis for ascertaining the goals of the statute." *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177, 180 (D.D.C. 1978) (citing *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-34 (1973)); see also *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971) (relying on stated legislative purpose in preamble of congressional statute to find legitimate secular purpose where statute was challenged on Establishment Clause grounds).

sional "findings and purposes" described in the AFLA demonstrate that Congress' intent in replacing Title VI with the AFLA was to utilize religious organizations to promote their values. The AFLA findings indicate Congress' conclusion that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood . . . are *best approached*" through services provided by religious organizations. 42 U.S.C. § 300z(a)(8)(A) to (B). Congress further found that AFLA services should "emphasize" support provided to adolescents by religious organizations. 42 U.S.C. § 300z(a)(10)(C).

Two additional provisions expressly provide for the involvement of religious organizations in AFLA programs. Section 300z-2(a) directs that "[d]emonstration projects *shall* use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." (Emphasis added). Section 300z-5(a)(21)(B) directs that every application for an AFLA grant "*shall include*" "a description of how the applicant will, as appropriate in the provision of services . . . involve *religious* and charitable organizations, voluntary associations, and other groups" (Emphasis added).

These provisions require every AFLA grantee to involve religious groups in its program, as is clear from the use of the word "shall" in each provision. See, e.g., *Manatu County v. Train*, 583 F.2d 179, 182 (5th Cir. 1978) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.") (quoting *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977)). Although the provisions list several types of organizations in addition to religious groups, the organizations included are separated by the word "and," rather than "or," making the provisions mandatory as to all of the organizations listed. E.g., *New Hampshire Auto. Dealers Ass'n v. General Motors Corp.*, 620 F. Supp. 1150, 1157 (D.N.H. 1985) ("Where the conjunctive term 'and' is used in a statute . . . all of the requirements of the statute must be fulfilled."), modified on other grounds, 801 F.2d 528 (1st Cir. 1986).

The "as appropriate" in section 300z-5(a)(21)(B) refers to the way in which religious groups are included and not to whether

they are included at all.²¹ This interpretation is strengthened by Congress' statutory finding that the involvement of religious groups in AFLA programs not only is "appropriate," but also should be "emphasize[d]," § 300z(a)(10)(C), and is among the "best approach[e]s," § 300z(a)(8)(B), to addressing the goals of the AFLA.²² Eliminating the participation of religious groups, as the district court did, directly conflicts with congressional intent and results in a statute very different from the one Congress enacted. The Senate Committee stated that, "[r]ecognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions," it included "promoting the involvement of religious organizations in the solution to these problems . . ." S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981). This Report also reveals that the Senate Committee decided to include religious organizations even though it realized that an Establishment Clause challenge was a possibility: "[P]rovisions for the involvement of religious organizations do not violate the constitutional separation between church and state." *Id.* at 15.

This Court has also considered subsequent agency action to help determine whether the statute should be severed. *See, e.g., Alaska Airlines*, 94 L. Ed. 2d at 672-73. Similarly, other courts considering whether to sever statutes have examined the manner in which the statutes operated. *See, e.g., Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. 714, 717, 721-22 (M.D. Tenn. 1974), vacated for reconsideration in light of statutory amendments, 421 U.S. 958 (1975); *Public*

21 Even if participation by religious groups in AFLA programs was not mandatory, Congress clearly intended to encourage strongly such involvement by repeatedly singling out religious groups as particularly desirable participants. Under either interpretation, Congress intended religious groups to play a central and integral role under the Act.

22 It is a fundamental rule of statutory construction that statutory provisions are to be construed, not in isolation, but as a whole in light of both the language of the statute, *U.S. v. Morton*, 467 U.S. 822, 829 (1984), and the purpose and intent of the statute, *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). *See also Lehigh & New England Ry. v. I.C.C.*, 540 F.2d 71, 79 (3d Cir. 1976) ("[W]e have . . . used the preamble as a guide to aid us in determining the legitimate scope of . . . the operative language of [the statute].")

Funds for Public Schools v. Byrne, 444 F. Supp. 1228, 1229-30, 1232 (D.N.J. 1978), aff'd, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979). In both *Dunn* and *Byrne*, the courts examined the manner in which the statute operated and concluded that, if severed, the statute would operate in a fashion dramatically different from what the legislature intended. HHS has interpreted the AFLA as requiring all AFLA grantees to involve religious groups and has denied funding to applicants that have failed to describe adequate religious involvement. *See Appellees' Br.* 7, 8 & nn. 15, 16. Given the undisputed record that the AFLA has been promoting religion for over six years, it is clear that severance would dramatically transform the AFLA.²³

IV. THE DISTRICT COURT'S ORDER REWRITING THE AFLA IS UNPRECEDENTED

The government seeks to minimize the involvement of religious groups in the AFLA by stating that the Act refers to religious organizations "only" four times. Gov. Reply Br. 15. Yet neither the government nor the intervenor has pointed to a single case in which a statute even mentions *once* the necessity of involving religious organizations in federally funded programs. Nor do they cite any case in which a court has both severed as many as four unconstitutional provisions that appeared throughout a statute and written a new limitation into the statute.

23 The government argues that section 300z-2(a) "makes no reference to the participation of religious organizations in AFLA programs . . ." Gov. Reply Br. 16. Yet it is difficult to imagine, and the government does not explain, how a grantee could "strengthen the capacity of families . . . to make use of . . . religious . . . organizations" without either involving religious groups or unconstitutionally promoting religious beliefs.

The government also argues that appellees "erroneously" state that the district court interpreted section 300z-5(a)(21)(B) as mandating the involvement of religious groups by all grantees; the government contends that the court stated that the AFLA simply permits religious involvement. Gov. Reply Br. 7 n.7. The government is mistaken on this point. The court construed this provision as follows: "Section 300z-5(21)(B) of the AFLA . . . further defines what types of institutions the AFLA benefits by explicitly requiring applicants to describe how they will involve 'religious organizations' in their programs." J.S. App. 39a-40a (emphasis added).

Most important, in all of the cases cited by appellants where this Court found a statute to be severable, there was a *clear* legislative intent in favor of severability, which is absent here.²⁴ In addition, in many of those cases,²⁵ the statute in question contained a severability clause. See *INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n*, 286 US. 210 (1932). The existence of a severability clause gives rise to a "presumption of severability." *Chadha*, 462 U.S. at 932.²⁶ Because it is an explicit statement of legislative intent, a severability clause precludes the need for the court to "embark on that elusive inquiry." *Id.* Thus, these cases are not persuasive authority for severing the AFLA, which does not contain a severability clause and the accompanying presumption as to legislative intent. Although the absence of a severability clause does not ordinarily give rise to the contrary presumption, against severability, the absence in the AFLA of *both* a severability clause *and* assurances of secular use of the funds is indicative of congressional intent and suggests a deliberate choice to

24 In fact in every case in which severability has been found by this Court, there was a clear legislative intent plus at least one of three factors, none of which is present in the AFLA. See Cr. J.S. 25-28.

25 The exceptions are *United States v. Jackson*, 390 U.S. 570 (1968) and *Alaska Airlines*, 94 L. Ed. 2d 661. In *Jackson*, this Court severed an unconstitutional death penalty clause from the remainder of the Federal Kidnapping Act. The Court found that "[i]ts elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." 390 U.S. at 586. Upon reviewing the statute and its legislative history, the Court concluded that it was "inconceivable" that Congress would have preferred to have no kidnapping statute if it could not include the unconstitutional death penalty provision. *Id.* *Alaska Airlines* is discussed *infra* at 15-16. The government also cites the plurality opinion in *Tilton v. Richardson*, 403 U.S. 672 (1971), which is discussed *infra* at 18-19.

26 If "radical dissection" is necessary to preserve the statute, severance is inappropriate despite the presence of a severability clause. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2181 (1986) (citing *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 445 n.37 (1983)); *Hill v. Wallace*, 259 U.S. 44 (1922); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

give a reviewing court no mechanism for removing the religious component of the AFLA.

The only case cited by the district court as support for its severability determination is *Alaska Airlines*, 94 L. Ed. 2d 661. Although the statute in question there did not contain a severability clause, this Court found "abundant indication of a clear congressional intent of severability." *Id.* at 671. Much of that evidence of intent stemmed from the distinctive nature of the severed provision which was a legislative veto provision. As this Court stated, "a legislative veto [provision] . . . by its very nature is separate from the operation of the substantive provisions of a statute." For this reason, the Court found no risk that a court faced with an unconstitutional legislative veto would need to "rewrite" the severed statute to make it capable of functioning independently. *Id.*²⁷ By contrast, the unconstitutional references to religious organizations in the AFLA occur in four places throughout the Act and are all substantive in that they encouraged direct and extensive religious involvement in AFLA programs.

Furthermore, the statute in *Alaska Airlines* made "a major change and fundamental redirection" in the regulation of air transportation, 94 L. Ed. 2d at 667; see also *Buckley*, 424 U.S. at 7 (this Court severed provision from "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress") (quoting Court of Appeals). The unconstitutional provision was a minor part of this comprehensive act and subjected only "insignificant" regulations to a veto, as the Court ascertained in part by examining the regulations that were actually proposed. The AFLA, on the other hand, is only a small demonstration project and clearly did not limit religious participation to "insignificant" portions of AFLA programs. Religious organizations were singled out as specifically desired grantees and were encouraged to participate in all phases of all AFLA programs. This Court in *Alaska Airlines* also noted that

27 Nevertheless, a court may not sever an unconstitutional legislative veto provision, even from a statute containing a severability clause, where to do so would be inconsistent with congressional intent. See, e.g., *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

a "report and wait" provision that would remain in the severed statute gave Congress an opportunity to oppose or influence new regulations before they went into effect, which "reduced any disruption of congressional oversight caused by severance of the veto provision." Obviously, if this Court rewrites the AFLA to prohibit the participation of religious organizations, that Act, which would be in direct conflict with congressional intent, would be effective immediately with no opportunity for congressional review.²⁸

Appellants seek to minimize the significance of the AFLA's repeated references to religion by suggesting that religious organizations are just one of many groups listed in the statute. Int. Reply Br. 6; Gov. Reply Br. 18. But the presence of other groups, like the presence of schools in the statute at issue in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) does "not dilute [the statute's] forbidden religious classification." *Id.* at 120 (quoting Court of Appeals). In *Larkin*, the Court found unconstitutional a Massachusetts statute that vested in the governing bodies of churches *and* schools the power to veto applications for liquor licenses within a five hundred foot radius of the church or school. 459 U.S. at 117. Although the Court found that the statute "embrace[d] valid secular purposes," *id.* at 123, and even offered statutory schemes that might not offend the Establishment Clause, *id.* at 124, the Court found the delegation of power to the churches unconstitutional.²⁹ The Court declared the entire statute unconstitu-

28 The statute at issue in *Chadha*, 462 U.S. 919, was similar to the statute in *Alaska Airlines*. It also contained an unconstitutional legislative veto provision and contained what was essentially a "report and wait" provision that allowed for some congressional oversight. 462 U.S. at 925. In addition, as noted above, the statute in *Chadha* contained a severability clause. *Id.* at 932.

Although the unconstitutional provision in *Tilton*, 403 U.S. 672, was not a legislative veto, it was analogous to one in that it was a single, isolated provision that was not dependent on the other substantive sections of the statute.

29 The Court in reaching its conclusion noted that the liquor license statute, like the AFLA, contained no assurances to guarantee that religious organizations would act only to further the valued secular goals of the statute:

The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore

tional and did not suggest that the statute could be severed or otherwise rewritten to permit schools to continue to have veto power over the location of liquor stores.

Other Establishment Clause cases also provide direct support against severing the AFLA. In *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court invalidated under the Establishment Clause a state statute that reimbursed parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The Court was asked to treat the law as "containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." 413 U.S. at 833. The Court refused this invitation and affirmed the lower court's finding that:

in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools. . . . The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted.

413 U.S. at 833-834; see also *Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. at 722; *Public Funds for Public Schools v. Byrne*, 444 F. Supp. at 1232. In these cases, there was a risk that religion would be promoted because from 63%, *Dunn*, 384 F. Supp. at 717 n.2, to 95%, *Byrne*, 590 F.2d at 1229, of the schools that would receive benefits were religious. Under the AFLA, religious organizations are to be involved in *one hundred percent* of the programs and the undisputed record demonstrates *actual* advancement of religion, not just a risk. See Appellees' Br. 9-17.

be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Larkin, 459 U.S. at 125.

In *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975), the Court refused to sever the constitutional provisions of one of the statutes at issue, even though the statute contained a severability clause, finding that it was a "minor" part of the Act and noting that the state would not necessarily have passed the law solely to provide the aid found not to be offensive. See also *Rhode Island Fed'n of Teachers v. Norberg*, 479 F. Supp. 1364, 1373-74 (D.R.I. 1979), aff'd, 630 F.2d 855 (1st Cir. 1980).

This Court has refused to sever statutes found violative of the Establishment Clause even where it found that the statute had a secular purpose and was not wholly motivated by religious purposes. Similarly, the pervasive presence of religion in the AFLA renders the "valid secular purpose" of the Act, J.S. App. 22a, irrelevant to the severability analysis.

Tilton v. Richardson, 403 U.S. 672 (1971), one of the only Establishment Clause cases in which the Court chose to sever a statute containing a provision that violated the Establishment Clause, is clearly distinguishable from this case. There the Court held that a federal statute that provided construction grants to universities was constitutional, except for a portion of the statute that limited to twenty years the authority of the government to recover grants that were used for religious purposes.³⁰ The Court severed the twenty-year limit and wrote:

We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. . . . [T]here is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684. Although Congress did not consider the unconstitutional provision in *Tilton* to be of great significance, Congress clearly viewed the AFLA provisions concerning religious organizations as necessary and essential to the success of AFLA. Furthermore, the statute in *Tilton* contained explicit statutory

³⁰ In striking down this provision, the Court held that the possibility that a grantee would use federally financed buildings for religious purposes twenty years hence could have the effect of advancing religion. 403 U.S. at 683.

restrictions on the use of the federal funds and there had been a track record of careful enforcement under the Act:

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. *These restrictions have been enforced in the Act's actual administration*

Id. at 679-80 (emphasis added). As the district court found, the AFLA has neither assurances nor an established track record:

. . . the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief. . . . This absence of any statutory prohibition on [sic] inculcation of religious belief puts the AFLA in a class by itself. The Court knows of no other statutory scheme that expressly contemplates religious involvement in a government-funded program and does not attempt to segregate inculcation of religious belief from public financial support.

J.S. App. 29a & n.13. As appellees' main brief and the undisputed facts indicate, the AFLA is unprecedented in its "track record" of promoting religion.

This Court has refused to write in necessary prohibitions that are missing from the face of the statute. In *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), this Court struck down a New York statute providing for reimbursement for certain testing and recordkeeping costs because the statutory restrictions on sectarian use were inadequate. They left the rewriting to the New York State legislature. In *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld new legislation that rectified the 1970 New York statute struck down in *Levitt*. Justice White stressed that if the statute in *Regan* had not contained statutory assurances, the outcome would likely have been different:

Of course, under the relevant cases the *outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services.* But here, as we shall see, the New York law provides ample safeguards against excessive or misdirected reimbursement.

Regan, 444 U.S. at 659 (emphasis added; citations omitted).

CONCLUSION

This Court should reverse the district court's decision to invent a statute different from the one passed by Congress. Obviously, Congress may properly reach the issue of adolescent pregnancy, but it is the method that Congress chose, and which the district court found clearly unconstitutional, that is at issue in this case. Invalidating the AFLA in its entirety will not, as appellants repeatedly insist, Gov. Br. 17-19, Int. Br. 14-17, open the floodgates for invalidation of federal health, housing or poverty programs through which some religious organizations sometimes receive federal funds. Rather, it will make clear that the government may not promote religion or teach religious values to achieve secular goals, whether in the area of sexuality, homelessness or hunger.

For the foregoing reasons, and for the reasons stated in our opening brief, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

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OCTOBER TERM, 1987

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. FOR APPELLANT UNITED FAMILIES OF AMERICA

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**ON APPEAL FROM THE
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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

**STATEMENT OF INTEREST OF AMICUS
CURIAE NATIONAL RIGHT TO LIFE
COMMITTEE, INC.**

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to

Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee have supported legislation to protect unborn human life within these guidelines. The Adolescent Family Life Act is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Adolescent Family Life Act.

BRIEF AMICUS CURIAE NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Brief, as they are amply stated in the Appellant's Brief of United Families of America.

SUMMARY OF ARGUMENT

The district court found that opposition to abortion is a "fundamental tenet" of many religions. Therefore, the court held that allowing religious organizations which support such a view to participate in a public funded program promoting adoption as an alternative to abortion violated the establishment clause of the first amendment.

However, opposition to abortion is a traditional societal value. It is not inherently religious, when viewed objectively. Beliefs of a religion which have discernible secular bases, in addition to any claim of Divine revelation, should be treated

differently from inherently religious beliefs, such as belief in one God, the incarnation of Christ, or reincarnation.

Opposition to abortion has roots in Western civilization, Roman law, English common law, and the scientific discoveries of the nineteenth century. In fact, the laws overturned in *Roe v. Wade*, protecting the unborn from the time of conception, were the result of the "physicians' crusade" of the American Medical Association. They were not primarily religiously motivated.

Despite these secular roots for opposition to abortion, a concerted effort has been mounted by abortion advocates to paint abortion as a religious issue. This has been done to exploit certain societal religious prejudices and to make abortion legislation vulnerable to establishment clause attacks.

Where establishment clause challenges have been made against abortion regulations, they have been consistently rejected by lower courts and by this court. In *Harris v. McRae*, this Court clearly held that, where certain values of society and religion coincide, such overlapping does not make legislation promoting such values violative of the establishment clause.

This Court has also upheld legislation allowing religious organizations to receive public funding to implement governmental objectives. This has been permitted specifically in the field of social welfare. Opposition to abortion stems from a traditional concern for humanity in the same way as concern for the welfare of orphans and neglected children. That the object of concern in abortion legislation is unborn children instead of born children is irrelevant. As the Court has permitted religious organizations to participate in other social welfare programs, it follows that they should be able to participate in the Adolescent Family Life Act. Concern for the unborn is no more inherently religious than concern for the born. There is no establishment of religion in such involvement by religious organizations.

ARGUMENT

I

OPPOSITION TO ABORTION IS A TRADITIONAL SOCIETAL VALUE AND NOT INHERENTLY A RELIGIOUS VIEW, AND, THEREFORE, LEGISLATION DISCOURAGING ABORTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

This amicus curiae brief will address the sole issue of whether the United States District Court for the District of Columbia erred in finding that the Adolescent Family Life Act (hereinafter "AFLA"), 42 U.S.C. (& Supp. III) 300z *et seq.*, is unconstitutional, insofar as it allows religious organizations to promote opposition to abortion. The relevant portion of the AFLA provides for the use of religious organizations, along with other private sector organizations, in demonstration projects to "promote adoption as an alternative" to abortion. 42 U.S.C. 300z(b). The AFLA further provides that no grants shall be made to organizations that provide abortions, abortion counseling, or abortion referral (referral may be made if requested by the adolescent and her parent or guardian). 42 U.S.C. 300z-10(a).

The District Court found opposition to abortion to be "a fundamental tenet of many religions." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1563 (D.D.C. 1987). The court observed that the AFLA did "not prohibit these religions from receiving AFLA grants." *Id.* Thus, the court held that the AFLA "contemplates subsidizing a fundamental religious mission of those organizations." *Id.*

The court further held that it was "unrealistic" "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine." *Id.* The court added that, "even if it were possible," it would be an imposition on religious liberty for government to request such putting aside of religious beliefs in counseling situations. *Id.* The danger of the

"infusion" of religious beliefs into the instruction was particularly dangerous, held the court, in the one-on-one counseling contemplated by the AFLA. *Id.*

Finally, the court noted the "symbolic link" between the government and religion, which resulted from religious organizations providing public funded advice to pregnant adolescents. *Id.* at 1564. The court concluded that the AFLA, on its face, violated the establishment clause, by having "the primary effect of advancing religion." *Id.* Noting that public funds had actually been given to religious organizations for AFLA instruction and counseling, the court also held the AFLA unconstitutional, as applied, both for having the primary effect of advancing religion and for excessive entanglement between government and religion. *Id.* at 1564-68.

The premise upon which the district court built its holding is that opposition to abortion is a fundamentally religious matter. This premise is false.

A. Opposition to Abortion is a Traditional Societal Value

The district court's declaration that opposition to abortion "is a fundamental tenet of many religions" is inaccurate, except to the extent that many religions consider abortion to be morally wrong. The Judeo-Christian tradition is the dominant religious influence in Western civilization. Judaism considered abortion wrong, even where it was accidental, at least from the time of the writing of the Pentateuch. Exodus 21:22. At the time of the first century of the Christian era, opposition to abortion among both Jews and Christians was strong. Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution* 123 (D. Horan, E. Grant & P. Cunningham eds. 1987). A passage, used by both Jews and Christians, from a late first century catechism states, "Thou shalt not kill the child before birth by abortion or after birth by infanticide." J. Quasten & J. Plumpe, *Didache* 18, *Ancient Christian Writers* (J.A. Kleist trans. 1948). Such religious opposition to abortion continues to the present among many religious groups.

However, to class such opposition as a “fundamental religious tenant” is a misperception of the nature of religion. Unlike articles of faith, such as a belief in the virgin birth of Christ, monotheism, the deity of Christ, and the efficacy of the eucharist, a belief in the moral wrongness of harming other innocent humans is also held by all civilized societies. A clear distinction must be maintained between moral values, which a religion may hold in common with society at large, and matters of special revelation, upon which the religion is built. The latter are fundamental tenets of a faith. The former, while perhaps viewed as important and binding upon the faithful, are in a different category, because those beyond the faith may also subscribe to the same moral values on grounds independent of special revelation from the deity.

The fact that a religion would find something immoral which was also held by society at large to be immoral is not remarkable. Nor should it doom legal promotion of such common values by government in a pluralistic society bound by a Constitution requiring that “Congress shall make no law regarding an establishment of religion.” U.S. Const. amend. I.

Opposition to abortion has a long tradition as a societal value apart from any religious support. Some of this tradition was traced in *Roe v. Wade*.¹ However, even though *Roe* discussed religious views on abortion at length, it did not conclude that opposition to abortion was primarily a religious value. In fact, *Roe* acknowledged the roots of American abortion laws in the “physicians’ crusade” of the nineteenth century. 410 U.S. at 141. To conclude that opposition to abortion is an inherently religious view would require this Court to go beyond the holding of *Roe*.

¹ *Roe* concluded that abortion laws “are not of ancient or even of common law origin.” 410 U.S. at 129. This, however, has been refuted by scholars. See generally S. Krason & W. Hollberg, *The Law and the History of Abortion: The Supreme Court Rejected* (1984); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979); Noonan, “An Almost Absolute Value in History,” in *The Morality of Abortion: Legal and Historical Perspectives* (J. Noonan ed. 1970).

Western civilization is a direct cultural descendent of the Graeco-Roman world. *Roe* cited Book V of Plato’s *Republic* as authority for the proposition that abortion was commended by the ancients. *Roe*, 410 U.S. at 131. An examination of the passage and its context makes it doubtful that Socrates, who was being quoted, was even speaking of abortion, let alone endorsing it. See S. Krason, *Abortion, Politics, Morality, and the Constitution* at 124-31. Aristotle, in Book VII of *The Laws*, opposed abortion for purposes of population control, gave the right, when exercised, to the state and not to the woman, and opposed abortion from the time when the scientific understanding of the day believed that life had begun. *Id.* at 130.

Rome began the nearly continuous tradition of written laws against abortion in the Western world at the end of the second century of the Christian era. Connery, *supra*, at 128. According to the Roman jurist, Julius Paulus, one giving another an abortifacient could be sentenced to work in the mines or exiled with forfeiture of part of his property. If death occurred, capital punishment followed. 1 *Corpus Iuris Civilis* 326 (S. Scott trans. 1973). Severus and Antoninus decreed that a woman inducing an abortion on herself would be exiled. 10 *Corpus Iuris Civilis* 328. No distinction between early and late abortion was made in these laws, and the law clearly was intended to protect the unborn, as well as the woman. Connery, *supra*, at 1280. It is also significant that these laws proscribing abortion occurred when Roman law still associated human life with birth and the fetus was considered part of the mother before birth. 6 *Corpus Iuris Civilis* 43-50. It is plain that the Romans were not reluctant to outlaw abortion even though they believed that a fetus was not a human being until birth. Connery, *supra*, at 1290. Connery posits a well-known legal maxim as the origin of such legislation, namely, that “whenever some benefit to the fetus was at stake it was to be treated like a person already born.” *Id.*

While Western civilization is a descendent of the Graeco-Roman culture, our legal tradition springs from the English common law. Early common law probably paralleled the late

Roman law, with a distinction between abortion for the fully "formed" fetus, thought to be at the gestational age of 40 days for males and 90 days for females, and the "unformed" fetus, before these periods. *2 Fleta* 60-61 (H. Richardson & G. Sayles trans. 1955). To the usual penalties from Roman law were added, in both Roman and common law, a capital penalty for abortion of a "formed" fetus. Connery, *supra*, at 130.

Even later, when the capital penalty was dropped, the common law consistently viewed abortion as a serious crime. Sir Edward Coke and William Blackstone declared that abortion was not murder, unless the child was born alive and then died from the resulting injuries. However, Coke declared abortion not considered homicide to be a great "misprision" and Blackstone declared it a "very heinous misdemeanor." E. Coke, *Third Part of the Institutes of the Laws of England* ch. 7; 4 W. Blackstone, *Commentaries on the Laws of England* 198 (1977). By this, Blackstone meant that it bordered on a capital crime. Connery, *supra*, at 130. Penalties could be severe, including loss of a member, life in prison, or forfeiture of property. E. Coke, *supra*, at 36, 39-40.

The teachings of Blackstone, of course, were predominant throughout the time from the framing of the Constitution and the first amendment to the time of the adoption of the fourteenth amendment. The common law protected the unborn at least from the time of quickening, the time when evidentiary problems could be resolved and the time when the science of the day believed that life began, and, probably, the common law also protected the fetus prior to quickening. Connery, *supra*, at 131-32.

In any event, the science of the nineteenth century underwent a profound transformation with the discovery of the human ovum and cell biology. The history of the origins of the nineteenth century American statutes limiting abortion, which were overturned in *Roe*, 410 U.S. 113, and *Bolton*, 410 U.S. 179, shows that their roots lie in the fields of science and medicine rather than religion.

Professor Victor Rosenblum has described the scientific discoveries prompting the medical profession to lead the way in gaining passage of abortion laws protecting the unborn from the time of conception. He observed:

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickenings" distinction embodied in the common and some statutory law was unscientific and undefensible.

The Human Life Bill: Hearings on S. 158 Before the Sub-comm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 474 (1981) (statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern Univ.).

About 1857, the American Medical Association led a "physicians' crusade" to enact legislation to protect the unborn from the time of conception. J. Mohr, *Abortion in America: the Origins and Evolution of National Policy, 1800-1900* 147-70 (1978). The resulting legislation, then, was not of primarily religious origin, but was prompted by the scientific and medical community.

Where traditional societal values are also a part of the moral value system of a religion, the fact that independent roots exist in secular society for such beliefs should remove legislation promoting these values from establishment clause evaluation.

Opposition to abortion is such a traditional societal value. It is not a "fundamental tenet of many religions," in the sense that belief in divine revelation is, and, therefore, is not a religious belief which is subject to the prohibitions of the establishment clause. Moreover, as the value is as much a traditional societal value as a religious one, the use of religious organizations to promote a governmental preference for adoption over abortion is permissible under the establishment clause.

B. Concerted Effort Has Been Made by Abortion Advocates to Make Pro-Life Views Seem Primarily Religious in Nature to Allow Establishment Clause Attacks

Certain factions in the abortion conflict have tried to paint opposition to abortion as a purely religious matter, thereby subjecting restrictive legislation to establishment clause attack. For example, the National Abortion Rights Action League (NARAL), and other pro-abortion groups, have made a conscious strategy of "tar[ring] all opposition with the brush of the Roman Catholic Church or its hierarchy, stirring up anti-Catholic prejudices, and pontificat[ing] about the necessity for the 'separation of church and state.'" B. Nathanson, *Aborting America* 172 (1979).

In his book, *The Abortion Papers: Inside the Abortion Mentality* (1983), Bernard Nathanson, a founder of NARAL (the acronym, NARAL, originally represented the name, National Association for Repeal of Abortion Laws), documents the appeal to anti-Catholic prejudice in the organization's literature. He cites a statement, issued by NARAL, at the National Symposium on Legislative Breakthroughs in 1972. Included in the statement was the following:

With Mr. Nixon's bungling assistance the Catholic hierarchy has proved in the last month that it is bent on a frightening course: to turn the abortion issue into a religious war . . . [W]hy has a fanatical minority of one religious faith suddenly determined to impose its dogma on the majority? . . . 'Heaven forbid that Albany should

|

become a Dublin or Buffalo a Belfast to prove the ruthless power of any religious organization,' the Rev. Jesse Lyons . . . warned recently.

Only one conclusion can be made: that the Catholic hierarchy is determined to bend the country to its will over abortion. What happens to all human rights in the next few years depends on what happens to abortion. If the Bill of Rights is to survive, we must never allow Cardinal Cooke to rule our bedrooms. We must never allow Catholic dogma to take over a legislature as it has done in New York

We have learned a terrible lesson: the Catholic drive is unrelenting, and this is only the beginning. We must start next week to match the most powerful lobby in the nation with equal force and similar tactics. . . . The Catholic lobby succeeded in New York by concentrating a massive attack on a carefully chosen list of spineless legislators and terrorizing them with the votes of controlled Catholic blocs.

B. Nathanson, *The Abortion Papers* at 179-80.

Nathanson says this document "anatomizes the fundamentals of NARAL's 'Catholic strategy.'" *Id.* at 180. "One is immediately struck by the fury, the pure vitriol of the text," he observes. *Id.* He adds that one could easily substitute the term "Jewish" or "black" resulting in a tirade one might hear from anti-semitic or racist groups. *Id.* The premises of the statement, he explains, include the implication "that any state legislator who voted against abortion law repeal . . . was 'spineless' in the sense that he was buckling under to some massive conspiracy having its roots in Rome" *Id.* "That a legislator might be voting his conscience, or might be voting what he perceived to be the will of his constituency is simply ruled out," he noted. *Id.* at 179-80.

Nathanson also documents another tactic employed to paint abortion as a Catholic issue. Anyone with Roman Catholic connections, who acted in opposition to abortion rights, would be labelled as Catholic in news releases and news accounts. The

religious affiliations of other actors in the events would, of course, not be mentioned. An example of this approach may be seen in a statement issued by NARAL concerning the efforts of Robert Byrn to have himself declared the guardian of unborn children in danger of being aborted. The NARAL news release declared: "A Roman Catholic judge [Smith] has initiated a disgraceful incident in judicial history. He has followed religious dogma in deciding a case in a court of law." *Id.* at 201. Notably, none of the other key players in the event were described as to their religious affiliation, in NARAL new releases or newspaper articles, except for Mr. Byrn himself, who was described as "a forty year old Roman Catholic bachelor." *Id.* at 200.

In a section on "legends" of the abortion conflict, John Noonan, Jr., now judge of the Ninth Circuit, documents other efforts to develop and exploit anti-Catholic prejudices by Planned Parenthood and NARAL. J. Noonan, *A Private Choice* 53-64 (1979). In contrast, he points to the origin of the nineteenth century abortion statutes in the "physicians' crusade led by the American Medical Association at a time when Catholics did not play a major role in American social legislation." *Id.* at 58. Modern legislation against abortion, such as that struck down in the *Doe v. Bolton*, 410 U.S. 179, came from the American Law Institute, not from the Catholic church or other religious bodies. In fact, the ALI statute was criticized by Catholics as too permissive. J. Noonan, *supra*, at 59.

Noonan provided another argument against recognizing establishment clause attacks on abortion regulation:

What the legend left out of its account was that the general Christian opposition to homicide could, if one so desired, be put in precisely similar terms. One could characterize as 'theological' every Christian claim that human beings should be respected, for every such claim derived from a view of human beings as created by God and destined for God, as 'ensouled' in traditional parlance. It was that creation and destiny which forbade their treatment as things.

To say that the Christian position rested on a theory of ensoulment and to proceed therefore to disqualify it in the realm of secular law was to imply that Christians had no right to be heard on killings in general. The Christian opposition to genocide, to urban air raids, to the war in Vietnam was no more and no less theological than the Christian opposition to abortion. The legend, focusing on the esoteric term 'ensoulment,' encouraged defenders of the abortion liberty to believe that the Christian objection was founded on an idiosyncratic theology when it depended on the general principle of respecting other human beings, supplemented by the biological observation that unborn children were part of the human species.

Id. at 53-54.

Krason has pointed out an irony in the whole debate. He observes that "[m]any religious denominations and organizations aided the campaign to change the [restrictive abortion] laws, and were welcomed as [was] the Religious Coalition for Abortion Rights, the first interdenominational religious group to be organized specifically to promote abortion 'rights.'" S. Krason, *supra*, at 73.

In reality, pro-life advocates represent all parts of the political and social spectrum. For example, Krason writes that, in 1971, the pro-life movement was "a mixed bag," including many non-Catholics, and one state chapter was headed by an agnostic of Jewish background. S. Krason, *supra*, at 69. Pro-life arguments are commonly made on the basis of the teachings of Hippocrates, the Declaration of Geneva from the World Medical Association, the Declaration of Rights of the Child issued by the United Nations General Assembly, B. Nathanson, *Aborting America*, at 173-74, and Aristotelian philosophy. S. Krason, *supra*, at 335-69. None of these is religious in nature.

The case now before the Court is the culmination of a sustained, coordinated strategy of abortion proponents to make opposition to abortion appear religious in nature. Such claims should be viewed by this Court with skepticism.

C. The Fact That Religious Teachings and Societal Values Often Overlap Is Irrelevant to Establishment Clause Analysis, According to the Precedents of This Court.

At the close of the last decade, abortion proponents brought a number of establishment clause challenges against abortion regulations. In 1979, an Ohio district court considered an establishment clause attack in *Akron Center for Reproductive Health, Inc. v. Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979). One of the clauses of the ordinance declared that human life existed from the moment of conception. It was argued that “the belief that human life exists from the time of the union of sperm and egg is a religious belief.” *Id.* at 1189. This belief was asserted to be the true motivation behind the whole ordinance. *Id.*

The court dismissed the claim that such a belief was clearly and peculiarly a religious belief, when viewed objectively. *Id.* It noted that the first prong of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), establishment clause test was easily satisfied, as many secular purposes were served by restrictions on abortion. *Id.* As to the second prong of the test, the court held that there was no primary effect of advancing religion. The court declared that the primary effect was “to impose regulations upon the performance of a medical procedure.” *Id.* at 1194. It concluded, “[w]hatever incidental effect that such section would also have on that woman’s religious beliefs, however, it could not be termed a ‘primary effect’ of advancing or inhibiting religion.” *Id.* at 1195. The court, likewise, found no excessive entanglement between government and religion, and rejected the claim that the “political divisiveness along religious lines” test applied to the abortion situation. *Id.* at 1195 n. 15.

Similar establishment clause claims were likewise rejected in *Women’s Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979, *aff’d*, 636 F.2d 206 (8th Cir. 1980); *Charles v. Carey*, No. 79-C-4541, slip op., (N.D. Ill. Nov. 16, 1979); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1978); and *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980). The latter opinion was affirmed in relevant part by this Court in *Harris v. McRae*, 448 U.S. 297 (1980).

In *Harris*, 448 U.S. at 319, this issue was settled unequivocally. The notion, that any legislation embracing a societal value which is also embraced by some religion is suspect under the establishment clause, was clearly rejected by this Court. The Court held that no “statute violates the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’” *Id.* (quoting *McGowan v. Maryland*, 336 U.S. 420, 442 (1961)).

In the earlier case of *McGowan v. Maryland*, this Court stated that, “In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation.” 336 U.S. at 442. The Court noted that laws against theft, fraud, murder, adultery, polygamy, and Sunday closing laws were not invalidated, simply because they coincided with the beliefs of the Judaeo-Christian religions. *Id.* at 442, 453.

Addressing the issue of abortion and its identification by some with certain religious organizations, the *McRae* court noted that opposition to abortion, as expressed in the Hyde Amendment, “is as much a reflection of ‘traditionalist’ values towards abortion, as it is the embodiment of the views of any particular religion.” *McRae*, 448 U.S. at 319. The history of American abortion legislation bears this out.²

In the AFLA, Congress passed legislation with a clearly secular purpose of promoting adoption as the preferred alter-

² Not even Professor Lawrence Tribe, the preeminent constitutional scholar advocating a constitutional right to abortion, finds abortion regulations violative of the establishment clause. Though he once held such a view, he has since conceded that this argument is faulty. *cf. Tribe Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) with L. Tribe, *American Constitutional Law* 928-29 (1978). To declare abortion inherently a religious issue would require going beyond even Tribe’s position. Tribe’s advocacy of abortion rights is evidenced by his writings and by his authorship of an Amicus Curiae brief submitted to this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*. Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and certain Other Members of the Congress of the United States in Support of Appellees, *Thornburgh*, 106 S.Ct. 2169 (1986).

native to abortion, which the district court herein acknowledged. *Kendrick*, 657 F. Supp. at 1560. Such a secular purpose was a valid one for Congress to promote, as held by this Court in *McRae*, 448 U.S. at 314 (quoting *Maher v. Roe*, for the proposition that a state may make “a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.” *Maher*, 432 U.S. 464, 474 (1977)).

Under the prior holding of this Court, then, the mere fact that a religious organization’s views on abortion happen to coincide with governmental policy does not create a violation of the establishment clause in legislation promulgated to further that policy. The AFLA has a clear, valid secular purpose, as conceded by the district court. Its primary effect is to encourage adoption over abortion and not to promote any inherently religious view or a particular denomination or sect.

D. Concern for the Welfare of Unborn Children Is No More Religious Than Care for Born Children or Adults, Which This Court Has Held Not to Violate the Establishment Clause in Like Circumstances

The concern of Christian and other religious pro-life advocates stems from a concern for the welfare of all humanity. This is a traditional societal value. Opposition to abortion itself is a traditional societal value. Where traditional societal values have coincided with the “mission” of a religious organization, government has in the past used religious organizations to achieve secular purposes. In both *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899), and *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976), this Court upheld the principle that religious organizations may be granted public funds for the performance of secular purposes, even though these secular purposes might also advance religious values of the organization.

If opposition to abortion is not an inherently religious value, as has been shown, then AFLA is no different from other governmental programs, upheld against establishment clause

attack, in which government has employed religious organizations to promote its policy choices. AFLA is analogous to care for orphans, upheld against establishment clause attack in *Sargent v. Bd. of Education*, 177 N.Y. 317, 69 N.E. 722 (1904), or like care for neglected adolescents, upheld in *Dunn v. Chicago Industrial School of Girls*, 280 Ill. 613, 117 N.E. 735 (1917).

However, because some religious organizations believe abortion to be wrong, the district court held that allowing them to receive federal funds to promote adoption over abortion had the primary effect of advancing religion. *Id.* As seen from the history of the abortion statutes in America, such legislation is not uniquely religious. Nor are the views of religious organizations on pregnancy and the beginning of human life especially “religious,” any more than are their views on feeding the hungry and caring for the powerless. As the district court in *McRae* declared, “*Roe v. Wade* [did not] remov[e] the issue from the field of secular action.” *McRae v. Califano*, 491 F. Supp. at 741.

On a practical level, it seems sensible that Congress should recruit those opposed to abortion to oppose abortion. The alternative, of hiring only those favoring permissive abortion to promote adoption as the preferred alternative to abortion, makes no sense. As a municipality may hire police officers with religious beliefs against murder and crimes of all sorts, so government should be able to enlist the aid of religious organizations that share the specific purposes that government wants to achieve. Of course, this is only allowable where the government purpose is secular in nature, as it is herein.

That Congress should choose to pursue its legitimate, secular, policy choices by a traditional means of employing religious organizations to aid it, along with other organizations, is wholly in keeping with the precedent of this Court.

CONCLUSION

The fact that a religious organization's beliefs regarding the preferability of adoption over abortion happen to coincide with the views of the state does not amount to a violation of the establishment clause, if that organization is allowed, under the AFLA, to promote that policy to adolescents. The district court erred under the prior decisions of this Court by applying establishment clause analysis, and concluding, thereby, that the AFLA had the unconstitutional primary effect of promoting religion and that, as applied, it constituted an excessive entanglement of government with religion. To affirm such a decision would require this Court to go beyond the holding of *Roe v. Wade*. Thus, the Amicus Curiae respectfully urges this honorable Court to reverse the decision below and declare the AFLA constitutional, on its face and as applied, with regard to the participation of religious organizations.

Respectfully submitted,

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JAN 7 1988

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health & Human Services,
Appellant.

v.

CHAN KENDRICK, *et al.*,

Appellees.

CHAN KENDRICK, *et al.*,

Cross-Appellants.

v.

OTIS R. BOWEN, Secretary of Health & Human Services, and
SAMMIE J. BRADLEY, *et al.*,

Cross-Appellees.

UNITED FAMILIES OF AMERICA,

Appellant.

v.

CHAN KENDRICK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**MOTION FOR LEAVE TO FILE BRIEF AMICI
CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE
FOR RELIGIOUS AND CIVIL RIGHTS, AND CON-
CERNED WOMEN FOR AMERICA, AMICI CURIAE**

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**MOTION FOR LEAVE
TO FILE BRIEF AMICI CURIAE**

The Catholic League for Religious and Civil Rights (hereinafter League) and Concerned Women for America (hereinafter CWA), pursuant to Rules 36.3 and 43 of the Rules of this Court, respectfully move for leave to file the appended brief amici curiae in support of Otis R. Bowen, Secretary of Health and Human Services and United Families of America, *et al.*, in these cases.

The League is a voluntary non-profit organization, national in scope, dedicated to the right to religious freedom and the right to life of all born or unborn. In pursuit of its interest in religious freedom, the League is especially concerned with ensuring that the Establishment Clause is not interpreted in manners which discriminatorily preclude religious entities from participation in programs ostensibly open to all. To this end the League has filed amicus curiae briefs with this Court in such cases as *Aguilar v. Felton*, 473 U.S. 402 (1985), in which it urged that the Establishment Clause not be used as a bar to government provision of remedial services to students in religiously oriented schools.

CWA is a national, non-profit women's organization based in Washington, D.C. CWA's purpose is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, humanitarian aid to refugees and legislative programs. CWA is also extremely concerned with government programs which deprive individuals and institutions of benefits because of their religious motivations or affiliations. This concern was most directly expressed in *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986). In that case, CWA attorneys represented an individual before this Court who had been improperly deprived of governmental benefits because of his choice of religious education.

The League and CWA will address the Establishment Clause questions in this case from a perspective emphasizing the Establishment Clause's policy of preservation of free-

dom of conscience through elimination of orthodoxy on religious matters. The brief will also outline the Establishment Clause difficulties resulting from judicial elimination of funding for religious groups. Although the Establishment Clause issues will certainly be addressed by all parties, it is unlikely that the parties will address these issues from the policy perspectives which the Catholic League and CWA will furnish. Thus, a brief from the Catholic League and CWA will be useful to the Court in its disposition of this case.

The League and CWA have applied to counsels of records for all parties for their consent to file this brief. However, when this brief went to the printer, consent for filing a joint brief had not yet been received. In the relatively likely event consent letters are received, they will be filed with the Clerk of this Court and this motion will be withdrawn.

For the foregoing reasons, the League and CWA move for leave to file the appended brief *amici curiae*.

Respectfully submitted,

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Nos. 87-253, 87-431, 87-462, 87-775

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**BRIEF FOR THE CATHOLIC LEAGUE FOR
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CONCERNED WOMEN FOR AMERICA,
AMICI CURIAE**

INTERESTS OF AMICI CURIAE

The interests of The Catholic League for Religious and Civil Rights and Concerned Women for America, as amici curiae are set forth in the Motion for Leave to File Brief Amici Curiae.

SUMMARY OF ARGUMENT

The district court's decision in this case is a classic illustration of this Court's observation that: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). By focussing only upon religiously oriented grant recipients under a single government program addressing adolescent sexuality and by not considering Establishment Clause difficulties raised by prohibiting these groups from funding, the district court's decision failed to implement the important policies underlying the Establishment Clause.

Legal tests developed under the Establishment Clause are useful only insofar as they implement the policies underlying the Establishment Clause. The Establishment Clause's purpose is to prohibit conduct which "in reality . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 citing *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy of preserving "the individual's freedom of conscience [which is] the central liberty which unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). In the context of the Establishment Clause this policy is carried out by ensuring that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 quoting *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Proper interpretation of these Establishment Clause poli-

cies requires that a court appropriately frame the issue and focus its inquiry. See *Lynch*, 465 U.S. at 680. Instead of examining the totality of government action in the area of adolescent sexuality, the district court improperly narrowed its analysis to the fact that the Adolescent Family Life Act (AFLA) funded "religious organizations." This focus failed to implement the Establishment Clause in light of its underlying policy of insuring individual freedom of conscience for four basic reasons. First, the district court improperly considered the AFLA in a "vacuum" and did not look at other governmental conduct in the area of adolescent sexuality which could legitimately be characterized as hostile to religion. Second, the district court improperly considered only the funding of religious organizations under the AFLA instead of examining all funding under that statute. See *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions the court must look at nature and consequences of program as a whole rather than characteristics of particular funding recipients). Third, and most significantly, the district court failed to grasp the serious Establishment Clause difficulties resulting from barring theistically oriented groups from funding. Such a bar inhibits religion and individual freedom of conscience by forcing theistically oriented groups to shed religious affiliations or motivations if they are to take part in programs ostensibly open to all. Finally, the district court's order that religious groups be forbidden from funding under the AFLA aggravates, rather than cures, Establishment Clause difficulties by effectively establishing a non-theistic orthodoxy on questions of religious significance.

Since the district court's analysis failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience, an alternative approach must be taken. Two such approaches would appear available.

The first would be a determination by this Court to take a generally more relaxed judicial approach to this case and other Establishment Clause cases. Building upon foundations

laid in such cases as *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court would uphold government funded programs which are open to all irrespective of religious affiliations or belief. Under such a construction Establishment Clause policies would be implemented because no individual or institution would be required to alter religious affiliations or beliefs to participate in a program. Further, governmentally supported orthodoxy would be prevented because permitting a broad variety of groups to be funded would allow a diversity of perspectives to be furnished which would be unavailable if religious groups were the exclusive entities funded, or as the district court decreed, excluded from funding entirely.

A second alternative approach would be a rigorous effort to ensure that government not establish an orthodoxy on religiously significant questions of adolescent sexuality. However, the Court must be prepared to face the fact that such an approach will require the elimination of *all* governmentally financed programs in the area of adolescent sexuality, not merely the prohibition of funding of religious groups under the AFLA or even the invalidation of the entire AFLA. However, the insulation of the religiously significant area of adolescent sexuality from government influence which would result from elimination of government funding for all adolescent sexuality programs would certainly implement the Establishment Clause. Governmentally supported orthodoxy would be eliminated because all decisions to fund groups in this area would become individual decisions of conscience rather than governmental actions.

ARGUMENT

I.

AN ESTABLISHMENT CLAUSE DECISION MUST IMPLEMENT THE POLICY OF FREEDOM OF CONSCIENCE THROUGH ELIMINATION OF ORTHODOXY ON RELIGIOUS MATTERS.

As the district court's decision demonstrates, Establishment Clause analysis often utilizes multi-faceted tests designed to gauge the conformity of government action to constitutional mandates. However, any Establishment Clause test or analysis is useful only insofar as it provides a means to implement the policies which underlie this constitutional protection. See *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("[T]he Court has scrutinized challenged legislation . . . to determine whether, in reality, it establishes a religion or religious faith, or tends to do so . . . The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application. [Its] purpose . . . 'was to state an objective not to write a statute.' ") (citations omitted). Thus, inquiry in this case must begin with an examination of the policies upon which the Establishment Clause is founded.

The Establishment Clause's purpose is prohibiting conduct which, "in reality, . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 citing *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy which unifies the entire First Amendment. In *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985), this Court explained that "the individual's freedom of conscience [is] the central liberty which unifies the various clauses in the First Amendment." (footnote omitted). Accordingly, any governmental action which furthers this central liberty implements Establishment Clause interests, while any governmental action impeding this liberty is suspect. Thus, legal tests implementing the Establishment Clause are properly employed only if their application advances the central constitutional liberty of preserving the individual's freedom of conscience.

In the Establishment Clause area the policy of individual freedom of conscience specifically requires that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 quoting *Board of Education v.*

Barnette, 319 U.S. 624, 642 (1943). Thus, the Establishment Clause, read in light of its underlying policy of protecting freedom of conscience, prohibits government from favoring or disfavoring religion in the course of its actions. Indeed, one prong of the Establishment Clause test formulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1970) specifically commands that a government action's principal or primary effect be one that neither advances nor inhibits religion.

As this discussion makes clear, the Establishment Clause is a limit on governmental action, not on the action of religious institutions. Thus, proper Establishment Clause analysis must focus upon whether *government* action tends to establish a prohibited orthodoxy on questions of religious importance. Instead of carefully examining the nature of the government action in this case, the district court's analysis was largely an exploration of the religious affiliations or motivations of certain funding recipients. While this was an interesting exercise, it did not properly address the central concerns underlying the Establishment Clause. See *Witters v. Washington Department of Services for the Blind*, 106 S. Ct., 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions a court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients).

II.

THE DISTRICT COURT'S ELIMINATION OF FUNDING FOR RELIGIOUS ORIENTED INSTITUTIONS FAILS TO IMPLEMENT THE ESTABLISHMENT CLAUSE AND ITS UNDERLYING POLICY.

An examination of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 679-680 (1984), reveals the shortcomings in the district court's Establishment Clause analysis. In *Lynch* this Court recognized that Establishment Clause cases often turn upon the manner in which a court frames the is-

sue and focuses its inquiry. When a court concentrates only upon government funding of a particular religious group, an Establishment Clause violation may seem clear. However, when a court considers every law addressing the subject in question, the character of every institution funded and the effect of excluding a group from funding solely on a religious basis, the Establishment Clause question becomes much more difficult. As the *Lynch* Court succinctly stated: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Put another way, a statute's religious effect may appear "direct and immediate" when only its religious components are considered, but will prove "remote and incidental" when the court focuses more broadly, and more fairly, upon the totality of governmental action pertaining to an area of concern. The district court's examination of the Establishment Clause issue is a textbook example of the error which can result when a court focuses only upon the "religious" component of challenged legislation.

The district court's analysis can fairly be characterized as one focusing almost exclusively upon the fact that the Adolescent Family Life Act funded "religious organizations." Such a limited focus fails to properly gauge the statute's conformity with the Establishment Clause, especially when the Clause is read in light of its underlying policy of ensuring individual freedom of conscience in religious matters. Four major problems resulting from the district court's inappropriately narrow analysis are immediately apparent.

First, the district court improperly considered the Adolescent Family Life Act (AFLA) in a "vacuum." Instead of examining the AFLA in the broad context of government funding of all groups which address teenage sexuality, the district court isolated this program from others addressing this subject matter. Assuming that the district court was correct in its conclusion that many find questions regarding sexuality, contraception and abortion religiously significant,¹

¹ See *Kendrick v. Bowen*, 657 F.Supp. 1547, 1563 (D.D.C. 1987).

it should have examined the totality of government action in these fields. An examination of all government programs in these areas would likely have found a much greater level of government funding directed toward groups and projects whose positions on these issues are hostile to many traditional Judeo-Christian beliefs. But, none of these programs (i.e., Title X) was considered or mentioned by the district court. By focusing only upon the AFLA, government subsidization of traditional theistic religions appeared to exist in subject areas in which government funding has likely been provided predominantly to groups which strongly oppose the moral concepts of traditional theistic religion. If anything, funding of religious entities under the AFLA may have alleviated Establishment Clause problems in the areas of sexuality, contraception and abortion by lessening the degree to which government inhibited religion through its support of groups whose beliefs on these religiously significant issues are contrary to those of many of the religious organizations who received grants under the AFLA. Indeed, an examination of the Establishment Clause, in light of its underlying policy of preventing government supported orthodoxy on religious important issues, could well require the inclusion of both theistic and non-theistic recipients in programs addressing these issues.

Second, the district court's improperly limited focus was also apparent in its consideration of funding patterns under the AFLA. Just as the court considered the AFLA in isolation from other governmentally financed sexuality programs, it also improperly considered the funding of theistic groups in isolation from the overall pattern of funding under the AFLA. See *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients). Even when judicial examination is confined to the AFLA, a full consideration of funding patterns would likely have found significant funding for groups which

do not concur with religiously oriented positions on sexually related issues.

However, the most significant shortcoming in the district court's analysis was its total failure to consider the Establishment Clause problems raised by a systematic exclusion of religiously oriented groups from government funding under the AFLA. Because the court focussed solely upon the constitutional implications of *funding* theistic groups, it failed to comprehend the serious Establishment Clause difficulties resulting from *barring* such groups from funding. Such a bar forces theistically oriented groups to shed religion affiliations or motivations if they are to take part in programs ostensibly open to all. This outcome inhibits religion, severely limits the funding of diverse viewpoints and promotes a state orthodoxy on the issues of sexuality and pregnancy which excludes religion. Such a result is directly contrary to the central Establishment Clause policy of preserving freedom of conscience through the prevention of government orthodoxy on religious issues. While straining to find the "splinter" of possible religious establishment through funding theistic groups under the AFLA, the district court was blind to the "plank" of the violation of central Establishment Clause policies which would result from the exclusion from funding of these same groups. Cf. Matthew 7:3.

The final major difficulty with the district court's analysis is closely related. The district court's remedy of eliminating theistically oriented groups from funding under the AFLA does not solve the Establishment Clause difficulties which the Court finds present in the AFLA. Instead, this remedy worsens the statute's Establishment Clause difficulties. Not only is governmentally subsidized teaching on supposedly religiously charged topics permitted to continue, but governmentally supported orthodoxy is furthered by the apparent permission of only a non-religious approach to issues thought to be inherently religious. This type of judicial attempt to develop a non-religious orthodoxy on issues of religious significance presents the same difficulties which inhere in any governmental pressure toward orthodoxy in such matters. As this Court noted in *Barnette*:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite and embrace. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissentors. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Barnette, 319 U.S. at 641.

These observations preceded the *Barnette* Court's landmark observation, which this Court repeated recently in *Wallace v. Jaffree*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) quoting *Barnette*, 319 U.S. at 641. Unfortunately, the district court's attempt to screen out religion aggravates the very Establishment Clause difficulties it is supposed to eliminate.²

² These Establishment Clause difficulties are in addition to the serious Due Process problems which result from the exclusion of theistic groups from participation in programs in which all other groups are eligible to participate. These problems were noted in the Jurisdictional Statement of Otis R. Bowen. See Jurisdictional Statement of Otis R. Bowen, Case No. 87-431, at 14.

III.

IMPLEMENTATION OF ESTABLISHMENT CLAUSE POLICY WILL REQUIRE EITHER A MORE RELAXED ESTABLISHMENT CLAUSE ANALYSIS OR ELIMINATION OF ALL GOVERNMENT PROGRAMS PROVIDING FUNDING ON SEXUAL MATTERS.

Clearly the district court's decision failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience. Fidelity to the Establishment Clause and its underlying policy requires this Court to choose either one of two alternative approaches to this case.

The first of these approaches may prove the most workable: the adoption of a more relaxed approach to Establishment Clause cases. Previous discussion has demonstrated that the district court's application of its version of a rigid Establishment Clause test failed to conform to the Establishment Clause's central policy of preservation of individual conscience through the prevention of governmental orthodoxy on religiously charged issues. An alternative would be for this Court to take a more relaxed approach to Establishment Clause cases in general, including this one. If this Court were to take such an approach, many of the absurdities of the type of analysis undertaken by district court would disappear.

This type of relaxed approach finds legal foundation in several of this Court's recent precedents. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court determined that programs open to all withstood Establishment Clause scrutiny even if portions of appropriated funds went to religious entities. This type of construction appear truer to the Establishment Clause's policy of preventing government supported religious orthodoxy than the more rigid approach to the Establishment Clause found in many of the parochial school aid cases and improperly ap-

plied in this case.³

Under this approach, government funding could be understood as analogous to a forum government creates, opens to all, and thereafter is unable to exclude participants on religious grounds. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (state may not exclude student religious groups from utilization of meeting facilities available to other student groups based upon the religious content of the groups' speech). Establishment Clause policies would be implemented in several ways. No individual or institution would be required to alter religious affiliations or beliefs to participate in the involved program. A cross-section of religious and non-religious participants would participate, since religious factors would not justify any groups inclusion or exclusion. Government supported orthodoxy would be prevented since a diversity of perspectives would be furnished which would be unavailable if religious groups were either the exclusive bodies funded or, as the district court decreed, excluded from funding entirely. Establishment Clause problems would also be avoided because neither religious nor non-religious groups would be specifically required to be included in the program. Compare *Edwards v. Aguillard*, 107 S. Ct. 2573, 2581-2582 (1987) (state action requiring that teaching conform to specific religious position found inappropriate).

While the alternative just outlined appears the most sensible approach to this case, amici also recognize that this court may desire to follow a more rigid approach to preventing government sponsored orthodoxy on religiously charged issues. However, such an approach would require a complete prohibition of any government funding for programs dealing with teenage sexuality.

³ Indeed, the central philosophical foundation of the parochial school aid cases is extremely flimsy. For example, Justice O'Connor's dissent in *Aguilar v. Felton*, 473 U.S. 402, 427-429 (1985) (O'Connor, J., dissenting), convincingly demonstrates the fallaciousness of the major assumptions of the analysis used in many of the restrictive parochial school aid cases: the likelihood that teachers paid in such programs will attempt to advance religion and the entangling effects of any state monitoring of the teacher's performance.

As was seen previously, elimination of theistically oriented participants from funding under a teenage sexuality program otherwise open to all does not prevent government sponsored orthodoxy on these questions. Instead, it actually promotes such an orthodoxy. If questions of sexuality, pregnancy, contraception and abortion are religiously charged, as the district court has apparently decided, the elimination of government sponsored orthodoxy on these issues would demand that government be completely forbidden from financing programs for funding private groups in these areas.

This result is not necessarily a bad one. As this court recognized in *Barnette*, 319 U.S. at 636-637:

Government of limited power need not be anemic government. Assurance that rights are secured tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The elimination of massive governmentally financed sexuality programs would allow these programs to be completely financed by the private sector. In the private sector, financing of programs dealing with teenage sexuality would be governed by individual decisions of conscience directing support to either theistic or non-theistic approaches to these questions. Accordingly, elimination of all governmentally supported grant programs in the area of teenage sexuality would certainly assure the absence of government supported orthodoxy and preservation of the rights of individual conscience.

Both rigid and flexible approaches to the Establishment Clause appear to have the potential of implementing that Clause's important central policy of preservation of individual

freedom of conscience through prevention of governmentally supported orthodoxy on religiously charged issues of sexuality. The district court's elimination of the participation of theistically oriented religious groups in AFLA programs conforms to neither of these approaches. Instead, it worsens the problem of governmentally supported orthodoxy, which is at the heart of the Establishment Clause's concerns, by eliminating the utilization of any theistic approach to issues it believes many find religiously significant. Since government may not place itself in a position either aiding or opposing religion, this Court must choose either a relaxed Establishment Clause test which prevents orthodoxy through non-discriminatory participation of individuals from all religious perspectives or choose a rigid Establishment Clause test which prevents any hint of governmentally sponsored orthodoxy by eliminating all government programs related to adolescent sexuality.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

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JANUARY 7, 1988

Supreme Court, U.S.
FILED
FEB 12 1988

JOSEPH F. SPANNER, JR.
CLERK

Nos. 87-253, 87-431, 87-462, and 87-775

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**On Appeal From The United States District Court
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**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM
AS AMICUS CURIAE IN SUPPORT OF
APPELLEES AND CROSS-APPELLANTS**

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**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM
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APPELLEES AND CROSS-APPELLANTS**

STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis; but all

recognize the importance of preserving the principles embodied in the Religion Clauses of the First Amendment. Members of the organization reside throughout the United States and share these concerns.

The issues raised in this case are of particular concern because of the far-reaching implications that may flow if this Court were to sustain the constitutionality of including religious organizations as recipients of tax-derived grants for activities which contemplate counseling with adolescents on matters of moral and religious concerns. The Council also believes that any retreat by this Court from its holding in *Flast v. Cohen*, 392 U.S. 83 (1968), would seriously threaten the Establishment Clause guarantees.

SUMMARY OF ARGUMENT

The Adolescent Family Life Act ("AFLA"), on its face, calls for the involvement of religious organizations in carrying out the statute's mandates. As such, without inquiring into the specific religiosity of each institution, the Court should recognize the inherently religious nature of such institutions, and their concomitant potential to use government aid impermissibly to foster their particular religious beliefs and practices. If the sponsored activity is one in which the religious institution would be likely to inculcate religion, then the statute, on its face, violates the Establishment Clause.

Amicus has argued, and the evidence from the grantees has demonstrated, that religious institutions, when carrying out the activity sponsored by the AFLA, are likely to inculcate their religious beliefs. The activity—counseling—is a one-on-one relationship during which the counselor has ample opportunity to transmit religious beliefs. The subject matter—abortion and premarital sex

—is one about which religions hold fundamental beliefs. The authority over the activity is held by religious institutions, whose influence is likely to be felt by both the counselors and the clients. Such an impermissible potential to inculcate a grantee's religious beliefs, in and of itself, violates the Establishment Clause.

Appellant Federal Government contends in its brief that the taxpayer-appellees do not have standing to litigate any claim against the application of the statute. *Amicus* contends that *Flast v. Cohen*, 392 U.S. 83 (1968), clearly establishes that appellees not only have standing to facially attack the statute, but also have standing to seek to overturn the application of the statute.

ARGUMENT

I. AFLA, ON ITS FACE, PROVIDES FOR DIRECT INVOLVEMENT OF RELIGIOUS ORGANIZATIONS; SUCH A PROVISION IS INHERENTLY LIKELY, UNDER ESTABLISHMENT CLAUSE PRINCIPLES, TO FOSTER RELIGION.

The Adolescent Family Life Act requires its grantee applicants to describe how they "will, as appropriate in the provision of services . . . involve . . . religious and charitable organizations . . ." 42 U.S.C. § 300z-5(a)(21) (1982) (emphasis added), in carrying out their care and/or prevention services. 42 U.S.C. §§ 300z-2, 300z-5(a) (1982). *Webster's New World Dictionary* defines the term "religious" as: "1. Characterized by adherence to religion or a religion; devout; pious; Godly. 2. Of, concerned with, appropriate to, or teaching religion . . ." *Webster's New World Dictionary* (2d Ed. 1986). *American Jurisprudence*, under "religious society," defines a "religious or church society" as

A voluntary organization whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry, providing the convenience of a church home, and promoting the growth and efficiency of the work of the general church of which it forms a coordinate part.

66 *American Jurisprudence* § 1 (2d Ed. 1973) (footnotes omitted) (emphasis added).

A. No Case-By-Case Judicial Inquiry Is Necessary to Determine That Religious Organizations Are Religious.

The fact that religious organizations are religious should be self-evident. Courts should not have to involve themselves in answering the question of whether religious organizations are religious. Such a position represents both a constitutionally prudent and a common sense approach that recognizes that any organization which defines itself as religious has an extreme likelihood of being religious. Professor Donald A. Giannella has aptly articulated the value of adopting a broad, versus a case-by-case approach, to the question of whether a religious organization is religious. His objections to a case-by-case approach are applicable to this case. He describes the Supreme Court's approach toward *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971):

The Court elected to use a broad-brush technique in picturing the nature of church-related schools at both the lower and higher levels of education. In this way it could make judgments that would have a more or less conclusive effect with regard to institutions not before it . . .

A broad approach . . . avoids burdensome and embarrassing problems for the judiciary. It eliminates the need of a case-by-case determination of which schools are too religious to receive aid without close supervision and which are not. Such a case-by-case approach would cause problems. First, the determination of different degrees of religiosity would involve the judiciary in just the kind of entanglement that the Court presumably was trying to avoid. Second, if a highly refined and particularistic test were adopted, some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. The *Horace Mann* decision provides an illustration of how a highly particularistic approach operates. In that case, the Maryland Court of Appeals struck down state grants to three church-related colleges but upheld one to a fourth institution on the ground that this school did not have a "fervent, intense, or passionate interest in religion." When judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive and equal treatment of religions and schools is seriously endangered.

Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 181.

This Court has also recognized the First Amendment problems implicit in a case-by-case determination of an institution's religiosity. In assessing a statute which may have required "a detailed audit in the Court of Claims to establish whether or not the amounts claimed [by the nonpublic school] for mandated services constitute a furtherance of the religious purposes of the claimant," *New York v. Cathedral Academy*, 434 U.S. 125, 131-32, (1977) (citations omitted), the Supreme Court stated:

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed

inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once . . .

Id. at 132-33.¹ See also *Aguilar v. Felton*, 473 U.S. 402, 413-14 (1985) (describing Establishment Clause problem of state agents making judgments concerning "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations" as both potentially politically divisive and "'rais[ing] more than an imagined specter of governmental secularization of a creed.'"). As the above demonstrates, adopting a *per se* rule that religious institutions are religious is consis-

¹ Cf. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), aff'd., 440 U.S. 490 (1979) ("The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. See, e.g., *Yoder, supra*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems.").

tent with the First Amendment's preference to avoid either requiring religious authorities to prove that their activities are religious or secular, or requiring secular authorities to resolve the same question.

This Court recognizes that categorizing certain schools as sectarian may not take into consideration the fact that "the degree of sectarianism differs from school to school," *Aguilar*, 473 U.S. at 412, n. 8, but believes that this "has little bearing on [the Court's] analysis . . . [E]nforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies" *Id.* (quoting Judge Friendly's opinion in the court below, 739 F.2d at 70). See also *Public Funds for Public Schools v. Marburger*, 358 F.Supp. 29, 34 (D. N.J. 1973), aff'd, 417 U.S. 961 (1974)² (concluding, based on the Supreme Court's recognition that "'the *raison d'être* of parochial schools is the propagation of religious faith,'" *Lemon*, 403 U.S. at 628 (Douglas, J., concurring), that nonpublic schools which have participated in program are, and will be, for the most part, church-related or religiously-affiliated educational institutions).

B. Programs Which Sponsor Activity Within Religious Organizations Are More Likely to Advance Religion.

An analysis of this statute's constitutionality must first recognize the Establishment Clause consequences of the fact that religious organizations are, by their very nature, formed to support religious ministry and "promot[e] the growth and efficiency" of the "church of which it forms a

² This Court's "affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." *Meek v. Pittenger*, 421 U.S. 349, 366 n.16 (1975).

coordinate part." 66 *American Jurisprudence* § 1 (2d Ed. 1973). Prior cases demonstrate that government sponsorship of programs within institutions of a religious nature can be itself determinative of an unconstitutional advancement of religion. *Compare Meek v. Pittenger*, 421 U.S. 349, 363 (1975) ("because of the predominantly religious character of the schools benefiting from the Act," "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion"); and *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (when aid earmarked for secular purposes flows to institutions where a "substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible effect of advancing religion) *with Wolman v. Walter*, 433 U.S. 229, 247-49, (1977) (offering therapeutic and remedial services by public employees "under circumstances that reflect their religious neutrality," will not have the impermissible effect of advancing religion). *See also Aguilar v. Felton*, 473 U.S. 402, 412 (1985) (program combining aid to pervasively sectarian institutions with aid in the form of teachers, violates the Establishment Clause).

II. NOTHING IN THE STATUTE INSURES A RELIGIOUS ORGANIZATION WILL NOT USE TAX FUNDS TO INculcate RELIGION.

When the state subsidizes an activity, such as counseling, it "must be certain, given the Religion Clauses, that subsidized [counselors] do not inculcate religion." *Meek*, 421 U.S. 371 (recognizing that "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular education responsibilities."). There is nothing, however, in the statute to insure that the religious organization/grantee will not use the aid to inculcate religion.

There is no requirement that services be provided on religiously neutral territory. *Cf. Meek*, 421 U.S. at 371. *See also Wolman*, 433 U.S. at 247. Nor is there a requirement that the grantees use materials prepared by secular authorities. *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). Nor is there any requirement that the counselors be religiously neutral in their approach or not be under the control of religious authorities. *Id.* at 480.³

³ Religious organizations, because of the Religion Clauses of the First Amendment, are afforded special protection. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). This includes protection against the government interfering with the selection of employees that are involved in transmitting the organization's teachings and beliefs. *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

In addition, in recognition of free exercise concerns, the Congress has exempted religious organizations from Title VII's prohibition against discrimination in employment because of religion. 42 U.S.C. § 2000e-1. *See also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862 (1987).

AFLA, however, provides for the payment of funds to these same religious organizations which have a constitutional and statutory right to discriminate on the basis of religion in employment matters. There is no waiver of these constitutional or statutory protections under AFLA. Justice White has noted that legislation providing assistance to sectarian schools, which restricts entry on religious grounds, would, to that extent, be unconstitutional. *Lemon v. Kurtzman*, 403 U.S. 602, 671, n. 2 (1971) (White, J., dissenting). This same reasoning should apply to religious organizations that hire counselors and pay them with tax-derived funds and at the same time enjoy the right to discriminate on the basis of religion as to hiring and other employment-related actions.

III. ONCE A STATUTE REQUIRES INVOLVEMENT OF RELIGIOUS ORGANIZATIONS, ITS CONSTITUTIONALITY DEPENDS ONLY ON WHETHER THE ACTIVITY IS OF A TYPE THAT ENTAILS RISK OF INculcating RELIGION.

The constitutionality of a statute, that on its face allows for the involvement of a religious organization in a governmental program, depends upon the type of government sponsored activity which the statute contemplates. If the statute contemplates sponsoring an activity in which there is a significant risk of governmental aid being used to inculcate religion, then such a statute offends the Establishment Clause. *Lemon*, 403 U.S. at 619-20 (presence of "potential for impermissible fostering of religion," which can be eliminated only by comprehensive, discriminating, and continuing state surveillance conflicts with the Religion Clauses.). Only when there is no such risk, as when the state provides services to religious institutions, "in common to all citizens [that] are so separate and so indisputably marked off from the religious function, . . . that they may fairly be viewed as reflections of a neutral posture toward religious institutions," *Wolman*, 433 U.S. at 251 n. 18 (citations omitted), is such aid permissible. The program in this case, however, does not conform to such a constitutionally permissible characterization. It conforms, rather, to characterizations of constitutionally impermissible programs.

A. Factors that Create Constitutionally Impermissible Risk of Inculcating Religion

This Court considers a number of factors in determining whether a sponsored activity is the type that creates this impermissible risk of inculcating religion. The first concerns whether the state has involved religious organizations in ideological activities that are related to the

religion-oriented function of the organization. *Meek*, 421 U.S. at 364 (teaching involves religious values and beliefs). This, the state is not permitted to do, because involving ideological material in an activity creates an opportunity for the actor to transmit ideological views. *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) ("substantial risk that these examinations, prepared by teachers, under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."); *Meek*, 421 U.S. at 366 ("the teaching process, to a large extent, is devoted to the inculcation of religious values and beliefs"), *Wolman*, 433 U.S. at 247 (therapist's relationship with pupil provides "opportunities to transmit ideological views" which creates danger of advancing religion, when therapy is conducted in non-neutral environment); *Id.* at 244 (distinguishing diagnostic services from counseling and teaching on the basis that the former "have little or no educational content and are not closely associated with the educational mission of the nonpublic school").

This Court also considers whether religious or secular authorities control those involved in the sponsored activity. Compare *Wolman*, 433 U.S. at 240, ("The non-public school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement."); and *Meek*, 421 U.S. at 371 (recognizing that in this case, "auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority.") with *Levitt*,

413 U.S. at 480, (recognizing that teachers who prepare tests under authority of religious institutions are more likely to inculcate religion); *and Lemon*, 403 U.S. at 617 ("We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.").

Likewise relevant to this Court's determination of the risk of the government sponsored activity inculcating religion is the relationship between those carrying out the program and the recipients of the program. This Court has noted that the relationship between counselor and student provides an opportunity for the transmission of sectarian views, beyond that provided in the constitutionally permissible relationship between diagnostician and the pupil. *Wolman*, 433 U.S. at 244. *See also Wamble v. Bell*, 598 F.Supp. 1356, 1371 (W.D. Mo. 1984) ("teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views.").

Based upon the above-described factors, it is clear that the AFLA program involves a significant risk that government funds—taxpayers' dollars—will be used to inculcate religion. The statute permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants. *See* 42 U.S.C. § 300z-5(a)(21)(B); *id.* at §§ 300z-1(a)(4)(A), (B), (D), (H), (L), and (M) (seven of seventeen listed services explicitly involve "education" or "counseling."). As the district court found, the grantee's functions

... amount to teaching by . . . religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather

than abortion, and these matters are fundamental elements of religious doctrine. Moreover, the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief.

Kendrick v. Bowen, 657 F.Supp. 1547, 1562-63 (D. D.C. 1987) (emphasis in original).

Thus, the AFLA offends all of the factors discussed above: The activity involves teaching and counseling, which provides the opportunity to transmit sectarian views; the material involves fundamental elements of religious doctrine; and the religious institutions can control the program. The district court recognized: "[B]y contemplating the provision of aid for the purpose of encouraging abstinence and adoption to organizations affiliated with these religions [which hold as a fundamental tenet that premarital sex and abortion are wrong, even sinful], the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 1563. A program of this nature inherently has a great potential for the diversion of secular funds to the inculcation of religious values and beliefs. *Amicus* submits that this program can be accurately characterized, as the court characterized the *Levitt* case, where "there was an impermissible risk of religious indoctrination inherent in some of the required services themselves," which rendered the program constitutionally invalid. *Cathedral Academy*, 434 U.S. at 131.

B. The Evidence Demonstrates AFLA Grantees Have Inculcated Religion as Part of Their Programs.

The materials produced by AFLA grantees evidence the reality of the risk that grantees will use the government sponsored program to inculcate their religious

beliefs. The material from one grantee, the Pregnancy Distress Center (PDC), demonstrates how this grantee is advancing religion in its AFLA program. The PDC material for counselor training instructs trainees when counseling a client who has had a negative pregnancy test, "If appropriate, [to] share God's plan for sex in marriage . . . Help *create* a dream for the client if there is not one there to re-awaken." (L.D. 57)⁴ The counselor is also to address "deeper problem solving," which is to include: "How could [the client] deepen relationships with others and with God?" *Id.*

The material the PDC provides to pregnant teenagers includes abundant references to religion and encouragement on the basis of "God's plan" for the teenager not to terminate the pregnancy:

Your choice to give another human being a chance at life is in keeping with God's plan. You might believe your pregnancy is a stumbling block. But God desires to turn your experience into a stepping stone toward Him.

Did you know that Psalm 139 applies to *both* you and your baby?

You made all the delicate, inner parts of my body and knit them together in my mother's womb. Thank You for making me so wonderfully complex! It is amazing to think about. Your workmanship is marvelous—and how well I know it . . . You saw me before I was born and scheduled each day of my life before I began to breathe. Every day was recorded in Your Book! (Psalm 139:13-16)

⁴"L.D. #" refers here, and in the upcoming paragraphs, to the page number of the "Lodged Documents" submitted to this Court by the National Organization of Women, Legal Defense and Education Fund, in connection with their *amicus* brief in this case.

Did you discover the significant words? *He saw us before we were even born!* Mindboggling, isn't it? God is keenly aware of our situation. He isn't just standing around watching it happen!

. . . [God] promises He will be right in the cyclone with us. "I am with you *always*, even to the end of the world." (Matthew 28:26) From the moment you chose to carry your baby full-term God chose to bless you because of your refusal to tamper with someone else's life.

(L.D. 41-42) (emphasis in original).

This material also includes "an example of the kind of prayer you might pray if you want to accept Jesus Christ as your Lord and Savior."

Lord, I bring you my sinful nature as you've revealed it to me. I know I don't have anything valuable to offer except myself and my love. I can't earn your forgiveness, but you've offered it as a free gift from your Son, Jesus Christ. I accept your control of my life, and intend to serve you, obey you and follow you from this moment forward. You have my past, my present, my future, my family, my child, my money and my time. Nothing will I withhold. Thank you for loving me and forgiving me and making me your own. Amen.

(L.D. 42).

The material from the Pregnancy Problem Center, another grantee, seeks "volunteers, prayers, and financial help," urging that "The child of the silent scream [referring to title of an anti-abortion movie] is your brother in Christ. His mother is your sister. Their cries go out to you." (L.D. 65) The group, the material advertises, is "seeking 7 people to pray each day for one hour for our work . . . Prayers could be done in church, at home, or within a prayer group." *Id.* This grantee likewise includes

in its material a "Prayer at an Abortion Chamber," which includes the following language:

Father I come to this place as to a new Calvary. I wish to stand here with Mary and those others who stood by the Cross of Jesus the day he sacrificed Himself for us sinners.

I firmly believe the sorrowful scene before my eyes is nothing less than a reenactment of Jesus' suffering and death, already anticipated in the massacre of the Innocents of Bethlehem and repeated in the slaughter of these least brethren of His, the tiny children brought here for killing.

O Father, I realize I cannot stop the killing of most of these children, any more than Mary could have the slaying of her Child that day. I unite my heart to hers in faith and grieving love and humbly adore your divine purpose in allowing such bloodshed. I offer you the blood of Jesus and, mingled with it, the blood of these little ones, the abortionists, and our whole society. Please remember Jesus' own prayer from the Cross with its echo in Mary's heart: "Father, forgive them for they know not what they do."

(L.D. 66)

The Christian Family Care Agency also involves religion in its advertisements for its services: "Through our adoption services, healthy Christian families are carefully screened . . ." These materials include numerous quotes from the *Bible* which are used to support the agency's actions. For example, the above advertisement for adoption services is followed by "The Christian who is pure and without fault from God the Father's point of view is the one who takes care of orphans . . . James 1:27."

(L.D. 8)

The above material substantiates *amicus'* argument that the risk that grantees will use government funds to

support their religious positions is inherent in the AFLA. It is clear from these quotes that these religious institutions/grantees have done precisely this.

IV. REVENTING THE RISK THAT TAX SUPPORTED ACTIVITY WILL BE USED TO INculcate RELIGION WOULD CONSTITUTE ENTANGLEMENT BETWEEN CHURCH AND STATE.

When the potential for impermissible fostering of religion is present, "[t]he State must be certain, given the Religion Clause, that subsidized [counselors] do not foster religion." *Earley v. DiCenso*, 403 U.S. at 618-19. However, in the context of the state-subsidized teaching and counseling by religious organizations,

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment . . . is . . . respected. Unlike a book, [however] a [counselor] cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the implications imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619. See also *Aguilar*, 473 U.S. at 410; *Meek*, 421 U.S. at 352-53; *Marburger*, 358 F.Supp. at 36-37, aff'd, 417 U.S. 961 (excessive entanglement would result from attempt to police use of material and equipment that were readily divertible to religious uses).

Thus, the excessive entanglement between government and religion that would be fostered by an attempt to monitor the program demonstrates the statute's unconstitutionality under the Establishment Clause.

V. THE STATUTE'S ENDORSEMENT OF RELIGION OFFENDS THE ESTABLISHMENT CLAUSE.

Government legislation that "endors[es] a particular religious belief or practice that all citizens do not share," offends the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). The religious belief that abortion and premarital sex are wrong is not a belief shared by all citizens. If an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of a particular religious belief or practice, then that statute cannot pass Establishment Clause scrutiny. *Id.*

The AFLA clearly sends a message of endorsement relative to those religious organizations that embrace religious tenets that premarital sex and abortion are wrong or sinful. Such a statute offends the Establishment Clause because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). As Justice O'Connor explains: A state endorsement of a particular religious belief or practice "infringes the religious liberty of the non-adherent, for [w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Wallace*, 472 U.S. at 70, quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

When an adolescent is counseled by an AFLA counselor, on the premises of a religious organization, about a matter which she knows to be a fundamental tenet of the

same religious organization, she would likely perceive that the state was endorsing a particular religious belief and practice. The adolescent who supports these beliefs would feel herself to be an insider, a favored member of the political community. The adolescent who opposes the beliefs would sense herself to be an outsider, only a partial member of the political community. The individual being counseled would likewise closely identify the government's power with the particular religious institution where the counseling occurs, and with the particular doctrine advocated. Such an appearance constitutes government promotion of religion. *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985). Children in their formative years are particularly vulnerable to perceiving such a symbolic union between church and state. *Id.* at 390.

VI. APPELLEES HAVE FEDERAL TAXPAYER STANDING TO CHALLENGE THE APPLICATION OF AFLA.

In this case the defendant and defendant-intervenors did not contest plaintiffs' standing to challenge the constitutionality of the AFLA on its face but contended that plaintiffs did not have taxpayer standing to challenge the Act as applied. *Kendrick v. Bowen*, 657 F.Supp. 1547, 1554 (D. D.C. 1987).

The Secretary, in his brief before this Court again raised the standing issue stating that "the district court erred when it held . . . that appellees have standing as federal taxpayers to challenge the statute as applied." Brief for Secretary Appellant at 31 n. 24. The Secretary makes this claim on its distorted reading of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). The Secretary

argues that “[j]ust as the plaintiffs in *Valley Forge* lacked standing to challenge ‘a decision by HEW to transfer a parcel of federal property’ . . . so, too, do appellees lack standing to challenge the individual spending decisions made by the Secretary in implementing the AFLA.” Brief for Secretary Appellant at 31 n. 24.

This Court ruled in *Flast v. Cohen*, 392 U.S. 83 (1968), that federal taxpayers have standing based on their status as such to challenge legislation when they meet the following two-part test:

First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, §8.

Id. at 102-103.

Applying this test, the Court in *Flast* specifically held that federal taxpayers have standing to challenge the constitutionality of programs enacted pursuant to congressional power under the Taxing and Spending Clause of art. I, §8 of the Constitution. The plaintiffs in *Flast* challenged expenditures by the Secretary of Health, Education and Welfare under Titles I and II of the Elementary and Secondary Education Act of 1965. That Act was an exercise by Congress of its power to spend for the general welfare under art. I. *Id.* at 103. It was alleged that certain expenditures under the Act were in violation of the Establishment Clause. The Court ruled that the

Establishment Clause acted as a constitutional limitation on the taxing and spending power of Congress under art. I. *Id.* at 104. Appellees in this case meet the requirements of taxpayer standing enunciated in *Flast*. The AFLA was also enacted pursuant to the Taxing and Spending Clause.

As the district court stated, the plaintiffs in *Valley Forge* were not challenging any expenditure whatsoever, they were challenging the disposal of surplus federal property. *Kendrick v. Bowen*, 657 F.Supp. at 1555. This Court in *Valley Forge* noted that the legislation authorizing the challenged action was passed pursuant to the Property Clause, art. IV, cl. 2 and held that this fact was “decisive of any claim of taxpayer standing under the *Flast* precedent.” 454 U.S. at 480 (footnote omitted). The challenge by appellees here is not at all similar to that in *Valley Forge*.

The Secretary interprets *Valley Forge* to hold that only facial challenges to congressional enactments can be brought under federal taxpayer standing. The Secretary’s argument must fail for two reasons. First, the Secretary’s interpretation reads too much into the Court’s ruling in *Valley Forge* and ignores the facts in *Flast*. The fallacy of this interpretation can be seen by an examination of *Flast* and other cases upholding taxpayer standing and by an analysis of the reasoning in those cases where taxpayer standing has been denied. Secondly, the Secretary distorts the nature of the appellee’s claim and strains to equate it with the claim in *Valley Forge*.

A. *Flast* and the Extent of Taxpayer Standing

In *Flast* the defendants were the federal officials in the Executive Department entrusted by Congress with the duty to administer the challenged Act. This Court summarized the complaint in *Flast* as follows:

While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic, and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." . . . The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions were deemed within the authority and intent of the Act, "the Act is to that extent unconstitutional and void."

392 U.S. at 87.

This language makes it clear that the Court did not intend to prohibit challenges to the actions of executive officers in implementing congressional spending schemes such as that presented here. In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court declined to rule on the issue of whether delivery of Title I services to parochial school students on the premises of parochial schools would violate the Establishment Clause. The Court noted that Title I did not require on-premises parochial school instruction and that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Id.* at 426. This Court said:

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A

federal court does not sit to render a decision on hypothetical facts . . .

Id. at 426-427 (citations omitted).

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court ruled on the merits of a taxpayer challenge to New York City's plan for implementing Title I. This Court specifically stated that the case was a taxpayer suit. *Id.* at 407. The defendants were the Secretary of the United States Department of Education and the Chancellor of the New York City Board of Education. In holding that jurisdiction by appeal under 28 U.S.C. § 1252 did not lie, the Court noted that the decision appealed was not one in which the court of appeals had "held an Act of Congress unconstitutional as applied (i.e. that the section, by its own terms, infringed constitutional freedoms in the circumstances of that particular case) or as a whole." *Id.* at 408, n. 7. This holding that the Court's jurisdiction was properly by way of petition for certiorari and not by appeal is significant. It was based upon the interpretation of 28 U.S.C. § 1252 in *United States v. Christian Echoes National Ministry*, 404 U.S. 561 (1972).

In that case, the Court made a distinction between a holding that an act is unconstitutional as applied and a holding that a result obtained by the use of the statute is unconstitutional. *Id.* at 565. The latter type of holding is not appealable under § 1252, and it was this type of holding that the Court held it was reviewing in *Aguilar*. The significance of this is that the Court was acknowledging that the taxpayer challenge in *Aguilar* was limited to the manner in which the Department of Education was administering Title I in New York City and was not a challenge to Title I itself.

This directly corresponds with the Second Circuit's characterization of that case. *Felton v. Secretary, U.S.*

Department of Education, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar v. Felton*, 473 U.S. 402 (1985). The Second Circuit also acknowledged that the case was brought by taxpayers whose standing was based on the Court's holding in *Flast*. *Id.* at 52. The Second Circuit characterized the complaint as challenging the delivery of services on the premises of parochial schools and said further that the program of on-premises delivery was based on regulations issued by the Secretary "[g]oing somewhat beyond the statute." *Id.* at 50.

B. *Valley Forge* and the Limits of Taxpayer Standing

The Secretary's interpretation of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), barring the claims here because they challenge executive action and not congressional action, misreads *Valley Forge* and would make a nullity of *Flast*.

The plaintiffs in *Valley Forge* challenged the transfer of surplus federal property by the Secretary of Health, Education and Welfare to a sectarian institution. The transfer was an isolated action taken pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.* This Act was passed under the authority of the Property Clause of the Constitution, art. IV, § 3, cl. 2. Not only was this not a congressional spending program, the transfer did not involve the expenditure of any funds. The Court in *Flast* specifically limited taxpayer standing to suits involving congressional acts passed pursuant to the Taxing and Spending Clause, art. I, § 8, 392 U.S. at 102. In *Valley Forge* the Court declined to expand taxpayer standing to suits involving congressional acts passed pursuant to other clauses.

Besides citing *Flast*, the *Valley Forge* Court discussed only two other cases in illustrating the limits of taxpayer standing: *Schlesinger v. Peservist Committee to Stop the War*, 418 U.S. 208 (1974), and *United States v. Richardson*, 418 U.S. 166 (1974). *Schlesinger* involved a claim that the holding of a commission in the armed forces reserve by members of Congress was a violation of the Incompatibility Clause, art. I, § 6, cl. 2., which states, "No person holding any Office under the United States, shall be a member of either House during his Continuance in Office." *Richardson* involved a claim that legislation allowing the CIA to withhold from the public detailed information about its expenditures violated the Accounts Clause, art. I, § 9, cl. 7, which states, "And a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

A reading of both of these cases, as well as the summary of their holdings contained in the *Valley Forge* opinion, reveals that taxpayer standing was denied because neither case involved a challenge to an enactment under the Taxing and Spending Clause of art. I, § 8, the same factor that was fatal to the standing claim in *Valley Forge*. The only reference with respect to Executive Branch action and taxpayer status is the following statement in *Schlesinger*:

We agree with that conclusion [of district court denying taxpayer standing] since respondents did not challenge an enactment under Article I, section 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.

418 U.S. at 228 (footnote omitted). This statement cannot be reasonably interpreted to bar taxpayer challenges to the manner in which an Executive Branch agency imple-

ments a spending program enacted pursuant to Congress' power to spend for the general welfare under art. I, § 8.

A proper understanding of the limitation of taxpayer standing to executive action is gained by a re-reading of the *Flast* decision, as the Court did in *Valley Forge* and the district court did in this case. In *Flast*, the Court, after limiting taxpayer cases to those challenging exercises of power under art. I, § 8 said, "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U.S. at 102.

C. The Secretary Ignores Settled Law and Attempts to Gut this Court's Decision in *Flast*.

A review of the jurisdictional statement and the various briefs of the parties filed in *Flast v. Cohen* is instructive and clearly demonstrates that the Secretary is attempting to now persuade this Court with the same arguments which the government made to this Court 20 years ago in *Flast*.

In the jurisdictional statement filed in *Flast*, the question presented was as follows:

The appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of Federal funds on the ground that it is in violation of the establishment and free exercise provisions of the First Amendment to the United States Constitution?

The government, in its brief in *Flast*, well understood the nature of the question presented to the Court in that case, stating it in language similar to that stated by the taxpayers as follows:

Whether appellants, as citizen-taxpayers, have standing, solely by virtue of that status, to enjoin federal officers from approving federal grants to State agencies which allegedly use the funds in violation of the First Amendment?

(*Flast Brief for Appellees* at 2).

The government, in its argument in *Flast*, stated:

That it is the specifics of administration that they assail rather than the constitutionality of the Act—a distinction which, as discussed below, is decisive on the three-judge court question—becomes even more clear when other statements in their brief are examined in light of the structure of the Act. . .

(*Flast Brief for Appellees*) at 13-14).

This case cannot be said to be less of an attack on a federal taxing and spending enactment than *Flast*. It is apparent that even after 20 years the government is still making the same argument long ago rejected by this Court in *Flast*.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court for the District of Columbia should be affirmed.

Dated: February 13, 1988

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

Otis R. Bowen, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant.

v.

CHAN KENDRICK, et al.,
Appellees.

Otis R. Bowen, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant.

v.

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants.

v.

Otis R. Bowen, SECRETARY OF HEALTH AND HUMAN SERVICES
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant.

v.

CHAN KENDRICK, et al.,
Appellees.

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF OF AMICI CURIAE

**NOW Legal Defense and Education Fund,
National Abortion Rights Action League
(List of Amici continued on inside front cover)**

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INTEREST OF AMICI CURIAE

The interest of the amici curiae are set forth in Appendix B attached to this brief.¹ Amici curiae are deeply concerned about the governmental promotion of religion and by the discrimination among religions built into the federal Adolescent Family Life Act. Amici are also concerned that the AFLA restricts and coerces women in their reproductive decisionmaking by silencing educational and health care professionals who would otherwise provide young women and their parents with full and accurate information about women's options with respect to contraception and abortion. This restriction and coercion affects poor

¹ The interests of each amicus curiae are set forth in detail in Appendix B. In accordance with Rule 36.2 of the Rules of this Court, amici file this brief with the consent of all parties. Letters of consent, facsimiles of which appear in Appendix A, are being filed with the Clerk of the Court.

women particularly harshly.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case as set forth by the appellees and cross-appellants Kendrick, et al., in whose support amici file.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Adolescent Family Life Act ("AFLA"), designed to involve religious groups, community groups, and families in teaching and counseling programs to curb sexual activity and pregnancy among adolescents, can pursue these goals by forbidding funded groups to provide, directly or indirectly, abortion counseling or referral without establishing religion. Amici curiae support and adopt the arguments set forth by appellees and cross-appellants Kendrick et al., urging affirmance of the district court's finding that the AFLA is unconstitutional on

establishment clause grounds, and seek to highlight that the AFLA grantees' provision of "prevention" and "care" services has involved and continues to involve² religiously-guided teaching and inculcation of religious doctrine.

Amici curiae also urge affirmance on alternative grounds, see Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), free speech and due process, because the AFLA is designed to steer adolescent participants as they exercise their fundamental rights in reproductive decisionmaking by silencing "prevention" and "care" service providers and censoring the information with which adolescent participants make decisions. Accordingly, amici urge this

² Amici curiae have lodged with this Court ten (10) copies of published documents obtained from current AFLA grantees together with affidavits authenticating the sources of the documents. Those documents are referred to herein as L.D. ("Lodged Documents") followed by the appropriate page number as they appear in the lodged document.

Court to strike down the statute as a whole, not just sever the portions of the AFLA involving religious groups.

ARGUMENT

The central issue before the Court is whether government funding of religious organizations to disseminate information inspired by religious doctrine is unconstitutional.³ The information delivered through the program concerns a topic that all parties to and participants in this case agree is of great public importance -- the sexual activity and reproductive decisionmaking of adoles-

³ Ancillary to, but part of, that issue is the impossibility of severing the language which unconstitutionally affiliates government with religious organizations from the remainder of the statute, since the entire statute was conceived and executed expressly to teach morals and values. See Brief of Appellees and Cross-Appellants Kendrick et al. For a full discussion of the establishment clause case law and issues implicated in this case, amici curiae refer this Court to the Brief of Appellees and Cross-Appellants Kendrick et al.

cents. The information provided through the Adolescent Family Life Act, 42 U.S.C. Sec. 300z et seq., is intended to and very likely does form an important basis for the major reproductive and life decisions of its teenage program participants. The statute, however, expressly precludes the funding of any speech in the nature of abortion counseling, or referral,⁴ and requires funded speech, among other things, to discourage use of contraception and to encourage adoption over other responses to teen pregnancy. The result is a silencing of abortion-related speech by any AFLA service provider, even with respect to activities not funded by the AFLA, and the provision of distorted, inaccurate and un-

⁴ Specifically, the statute restricts funding as follows: "[g]rants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortion or abortion counseling or referral." 42 U.S.C. Sec. 300z-10a.

balanced "information" to young women and their parents. This statutorily mandated omission of information amounts to misinformation, and distorts the ability of young women to make critical reproductive life decisions in consultation with their physicians and parents. Thus, the statute impinges upon the constitutional rights of free speech, thought and privacy of the program's potential service providers and adolescent participants.

I. THAT CURRENT GRANTEES, LIKE GRANTEES EXAMINED AT TRIAL, ARE PROMOTING RELIGION DEMONSTRATES THE CONSTITUTIONAL DEFECT INHERENT IN THE STATUTE.

In certain kinds of government programs, it is possible for religiously-affiliated groups to provide purely secular services without the unconstitutional promotion of religious doctrine; in such circumstances religious organizations should stand on an equal footing with secular service providers

having no religious connections. The AFLA is not such an endeavor. The AFLA, by its very terms, requires the government to place its seal upon particular religious doctrines.

The record starkly demonstrates that the speech of religious organizations involved in the initial AFLA demonstration program is inspired by religious doctrine. By requiring involvement of religious organizations but precluding abortion counseling or referral by grantee service providers, directly or indirectly, the AFLA selects those religions which forbid even the contemplation of abortion.⁵ For such religions, abortion is

⁵ While the religions funded under the AFLA teach that full personhood exists from the moment of conception and develop their teachings on that doctrine, this Court has appropriately held that government may not advocate one theory of when life begins. Roe v. Wade, 410 U.S. 113, 159-62 (1973). Nor may the state constitutionally assert an interest that grants the fetus a status equivalent to that of the woman. By selectively funding organizations which adhere to the conviction that developing embryos should have the same legal protections as born persons, the federal

never discussed in any positive or even neutral terms in either the devotional or the service context. It is no accident then that, as the record shows, AFLA funding has flowed to select religious groups -- Catholic, Mormon, Fundamentalist -- but not others. The result is governmentally funded, doctrinally approved coercion of young women.

For example, the employees of Catholic grantees are bound by Church doctrine that periodic sexual abstinence in marriage is virtuous, and that extramarital sex, con-

government has done indirectly that which it is prohibited from doing directly: it has placed its "power, prestige and financial support," see Engel v. Vitale, 370 U.S. 421, 431 (1962), behind a particular theory of human existence. The government's direct support of this religious belief is not merely incidental to its adoption of a secular policy; rather, the federal government has chosen to fund certain religious groups specifically because of their anti-abortion beliefs, and not merely in spite of them. See Sec. 300z(10)(a).

traceptives and abortion are evil.⁶ The Catholic ideal is that a woman has a duty to sacrifice her interests for those of an embryo or fetus.⁷ Similarly, "[f]or the fundamentalist, God is the cause and power of all that is and God governs all natural processes. Therefore, not only is the conceptus regarded as of equal value and personhood with the woman, but conception is viewed as the consequence of an Act of God." J.A. 594 (Simmons Affirmation). A woman then is not seen as a participant in her fate, but rather as the passive vehicle through which the

⁶ Pope Paul VI, Humanae Vitae 225-27, 229, 231 (July 25, 1968) (encyclical on the regulation of birth), as published in The Papal Encyclicals 1958-1981 (C. Carlen Ihm ed. 1981); Ethical and Religious Directives for Catholic Health Facilities, J.A. 550. (Appendix A to Maisenbacher Affirmation).

⁷ One study guide for a film used in an AFLA Catholic Family Services program stated: "The unwed mother is a person in need and calls us to be compassionate, as Christ was. She is also a sign of hope, witnessing to the fact that the life of her child is worth personal sacrifice." J.A. 559.

divine will is manifested. The issue is not, of course, the validity of these religious views, which this Court is not permitted to determine.⁸ The point is, however, that the government may not constitutionally enforce these views on women.

Although many of the AFLA-sponsored seminars and counseling sessions explicitly refer to "God," religious doctrines and

⁸ Amici curiae certainly do not argue that, when unaided by government funding, such groups may not advocate their religious views. These and all other religious organizations are entitled not only to hold freely their beliefs, but to have those beliefs respected by all instruments of government. Indeed, historically, the first amendment protected from government intrusion and coercion those very religious groups now being funded. The establishment clause "embodie[s] the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other." Abington School District v. Schempp, 374 U.S 203, 259 (1963). See also Everson v. Board of Educ., 330 U.S 1, 15-16 (1947).

religious affiliations,⁹ they need not mention religious words like "God" or "sin" to convey

⁹ See, e.g., L.D. 67 (Current AFLA grantee, Pregnancy Helpline, provides clients with a brochure called "The Life Rosary," which states: "Mary and Joseph were distressed to have lost Jesus in the temple. Many who come to us are distressed because they have lost or never found Christ. May each young woman who comes to us find Him through our counseling, help, and prayers."); L.D. 14 (Current AFLA grantee Christian Family Care Agency calls on young pregnant AFLA program participants to "[p]ray with us for: God's will for your family with regard to the child He has for you; Wisdom for our staff as we serve the children and families God sends us."); L.D. 57 (Current AFLA grantee, The Pregnancy Distress Center, instructs its counselors to "share God's plan for sex in marriage . . ." with its clients); L. D. 72 (Current AFLA grantee, A Woman's Choice, recommending that "[w]hen a person who is tempting comes around, start talking about Jesus Christ"); J.A. 36-37 (St. Ann's Infant and Maternity Home's manual instructing parents that "Sexuality is one of God's greatest gifts" and urging them "to find peace and strength in a full sacramental life with the Christ who loves them"); J.A. 551 (St. Margaret's employee handbook stating that it is a "Christian institution," providing medical care "in harmony with the teaching of the Catholic Church," and that each person is "a child of God [from] the very moment of conception").

religious ideology.¹⁰ For example, current AFLA grantee, the Pregnancy Distress Center of Columbus, Ohio, features a "Psychological Profile of Women Seeking An Abortion." For the "neurotic," the Center encourages counselors to "stress fetal development and prayer assignment." For the woman with a "character disorder," the Center claims that "these disorders are a result of repeated broken relationships ... Use any argument you can-- don't worry about causing guilt feelings-- you won't." L.D. 56. (emphasis added). Perhaps the worst establishment clause violation occurs when the young person and his

or her parents hear government-funded "teaching" or "medical advice" that includes these the same religious messages but fails to acknowledge that the teaching emanated from and may be distorted by the views of a religious source. See pp. 30-31 infra (recounting information provided by St. Margaret's and Families of the Americas Foundation).

The examples of religious indoctrination shown in the record are not just a few "abuses" in the early stages of the program's implementation as the appellant would have this Court believe. See Brief of Appellant Bowen, at 36 n.30 & 41. This is made clear by the conduct of current AFLA grantees.¹¹ For example, on a recent visit to

¹⁰ See, e.g., J.A. 572 (the objectives of AFLA-funded "Here's Life Washington" program are "[t]o promote a lifestyle based on Biblical principles" through "[i]ndividual counseling based on Scriptural principles"); J.A. 284 (Deposition of John D. Hartum) (stating that he "based [the AFLA-funded program] all on Jesus Christ" because "That's the way I do things . . ."); J.A. 390 (Christian Sexuality Program "whose goal is to develop and disseminate an educational program based on the teachings of the Catholic Church").

¹¹ See generally the lodged documents referred to in note 2 supra. The appellant argues that religiously affiliated grantees do not promote religion by complying with the AFLA's abortion restrictions because "the statute itself imposes the same restriction on the funded programs." Brief of Appellant

the Pregnancy Distress Center of Columbus, Ohio, one woman was told by the counselor to open her heart to God referred to a local church for more counseling. L.D. 28. In fact, the Pregnancy Distress Center of Columbus, Ohio, which recently received \$119,135 in AFLA funds,¹² states in its counseling manual: "When counseling girls and women considering an abortion, sometimes we have the opportunity to share our faith with them and urge them to let God be a part of

Bowen, at 33. First, this argument falsely assumes that the "secular" nature of the funded activity is severable from the religious convictions of those providing the services, and thus assumes that the abortion restriction is not on its face tantamount to promotion of certain religious tenets. Secondly, it ignores the fact that through the AFLA, religious organizations have been and continue to be granted an open license to provide services and counseling in furtherance of their religious missions. The documents lodged with this Court herewith illustrate this point.

¹² L.D. 109-10 (list of current grantees and amounts awarded, as announced by the U.S. Department of Health and Human Services on November 5, 1987).

this important decision." See L.D. 55. The manual continues by suggesting that counselors suggest to clients: "If Jesus were sitting right here, would He tell you that it's alright to have an abortion?" Id. Clearly, the AFLA's problem of religious establishment has not been cured.

That not all AFLA grantees are religious organizations does not save the program; the statute was intended to and does encourage all grantees to talk about moral values. This has resulted in a particularly pernicious version of government involvement in religion in the case of at least one current AFLA grantee. As one affiant described a visit to receive pregnancy counseling at "A Woman's Choice" in Vienna, Virginia, the counselor ascertained the counselee's religion (Jewish) and proceeded to read her an article by a rabbi. While the article did not say that the Jewish faith disapproved of abortion, the counselor

implied that it did and used other religious references and terminology to pressure the counselee not to terminate the pregnancy.

L.D. 69. There was no indication that "A Woman's Choice" had any affiliation with the Jewish faith. The strategy of this AFLA grantee was fully consistent with the AFLA's design and purpose. The misrepresentation of religious tenets and exploitation of the counselee's faith to serve the AFLA's end demonstrates dramatically the damage that the AFLA has done and will do if it is permitted to stand.

II. THE AFLA TRAMMELS THE FREE SPEECH AND PRIVACY RIGHTS OF THOSE HAVING CONTACT WITH THE PROGRAMS.

The AFLA was designed to alter the terms of the public discourse on the issues of adolescent sexual activity, reproductive health, contraception and abortion. It is intended to bring about a change in the

behavior of young people by silencing the educators, counselors, community leaders, and medical professionals who are willing openly and accurately to discuss adolescent sexuality and reproductive health, including contraception and abortion, and by amplifying with government funding the voices of those who promise not to discuss these critical issues.

A. By Its Very Terms, Section 300z-10 Requires Viewpoint-based Discrimination in Violation of the First Amendment.

1. That the censorship of speech at issue here occurs as a condition on government funding does not alter its invidious nature.

The AFLA requires the withholding of information critical to reproductive choice and encourages the spreading of misinformation in the guise of providing education and health care. By its very terms, then, Section 300z-10 requires viewpoint-based discrimination in

violation of the first amendment:¹³ it prohibits AFLA-funded facilities, their professional personnel, and their subcontractors from engaging in activity which advocates, encourages or promotes abortion.¹⁴ Although

¹³ U.S. Const. amend. I.

¹⁴ The AFLA does not prohibit speech which discusses abortion in a pejorative light. Indeed it was understood by one key AFLA administrator that talking about abortion as "killing" was "probably all right." J.A. 93 (Deposition of Sheeran, Director, Division of Program Development and Monitoring, HHS Office of Adolescent Pregnancy Programs) (referencing the AFLA's requirements and how to monitor them). In addition to being viewpoint-based, Section 300z-10's requirement that AFLA grantees avoid all conduct which may "in any way have the effect of facilitating obtaining an abortion" is unconstitutionally vague. When a statute is so vague as to "operate[] to inhibit the exercise of individual freedoms affirmatively protected by the Constitution," it is invalid. Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961). Section 300z-10, like the ordinance struck down in Coates v. Cincinnati, 402 U.S. 611 (1971), is unconstitutionally vague because it ". . . subjects the exercise of . . . [a] . . . right to an unascertainable standard, and unconstitutionally broad because it [penalizes] . . . constitutionally protected conduct." Id. at 614.

There is no limit to the type of activity which could fall within the scope of Section

there is no constitutional requirement that Congress create or subsidize programs such as the AFLA program, "the manner in which [HHS] dispenses benefits [pursuant to such programs] is subject to constitutional limitation." Maher v. Roe, 432 U.S. 464, 469-70 (1977). Having undertaken to create a program designed to discourage adolescent sexual activity through sex education and counseling, neither Congress nor HHS can "discriminate invidiously in their subsidies in such a way as to 'ai[m]' at the suppression of [what are seen as] dangerous ideas.'" Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983).¹⁵

300z-10. The presence in a clinic waiting room of a newspaper containing an abortion clinic advertisement or a Yellow Pages containing such advertisements might be deemed to violate this regulation.

¹⁵ See also Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 778, 811-12 (1985) (exclusion from government benefit that is in fact based on the desire to suppress a particular point of view with which government disagrees is unconstitutional); Big Mama Rag Inc. v. United States, 631 F.2d 1030,

The AFLA does just this in a very cunning way by conditioning government funding on a pledge of silence on the subject of abortion as a medical and personal option.¹⁶ A recipient of AFLA funds is precluded from abortion counseling or referral even where such speech is subsidized by non-AFLA funds. The statute requires further that grantees not subcontract with any organizations that refuse to accede to the AFLA's speech restrictions.¹⁷

1034 (D.C. Cir. 1980) ("although first amendment activities need not be subsidized by the state, the discriminatory denial of [discretionary benefits] can impermissibly infringe free speech"). The case of Harris v. McRae, 448 U.S. 297 (1980), is not to the contrary. Unlike the right to obtain an abortion at government expense, freedom of expression untrammeled by government censorship in any of its forms has been accorded the highest level of constitutional protection. Carey v. Brown, 447 U.S 445 (1980).

¹⁶ This pledge has of course been an assymetrical one, however, as the DHHS has not interpreted the statute as forbidding speech which condemns abortion. See note 14 supra.

¹⁷ "Grants . . . may be made only to programs . . . which do not provide . . . abortion counseling or referral, or which do

In addition, the requirement that grantees "coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons," Sec. 300z-3(a)(2),¹⁸ imposes speech restrictions on community service providers who, and information resources that, are drawn into cooperation with the AFLA project. The government's AFLA grants then, do not merely add certain approved messages to an already busy marketplace of ideas; they co-opt and then appropriate the entire marketplace.

In the low-income communities with high

not subcontract with or make any payment to any person who provides . . . abortion counseling or referral." Sec. 300z-10(a)(emphasis added).

¹⁸ ". . . the purposes of this subchapter are . . . to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents . . . which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs . . ." 42 U.S.C. Sec. 300z(b)(3)(emphasis added).

adolescent pregnancy rates that are the explicit targets of the government's "chastity-reinforcement" campaign,¹⁹ the AFLA's restrictions on disfavored information have a particularly insidious effect. The young people and their parents who will be AFLA program participants in these disadvantaged areas have meager educational and health care resources at their disposal²⁰ and their needs

¹⁹ "In approving applications for grants . . . the Secretary shall give priority to applicants who -- (1) serve an area where there is a high incidence of adolescent pregnancy; (2) serve an area with a high proportion of low-income families and where the availability of programs of care . . . is low; (3) show . . . the ability to bring together a wide range of needed . . . services[,] . . . a well-integrated network of such services . . . [or] will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood and primary health care centers, . . . agencies serving families, youth, and children . . . [and] maternal and infant health centers . . ." 42 U.S.C. Sec. 300z-4(a)(1)-(4).

²⁰ As nurse Kim Maisenbacher of St. Margaret's hospital explained, "I believed that my teenage patients could get abortion or contraception information from outside

leave them that much more vulnerable to government-sponsored efforts to steer their behavior. The greater the impoverishment of the community, the more powerful the inducement to relinquish first amendment integrity.²¹ By co-opting community networks and

community resources. Subsequently, I found out this was practically impossible. Many of the teenage TAPP patients are poor, and nearly all are ignorant on how to make use of community resources." J.A. 551 (Maisenbacher Affirmation).

²¹ Although such intent does not appear explicitly on the face of the statute, the Committee Report documents the unqualified intentions of the AFLA's proponents that a mechanism should be created through which the speech restrictions can be imposed upon all public benefit programs which the federal government funds, subsidizes, or cooperates with:

The DHHS has been given the authority under the act to review all programs which provide prevention . . . for pregnant adolescents . . . [T]he Secretary should examine other programs to determine the degree of duplication and philosophical consistency existing in current Federal programs including family planning, welfare and health maintenance programs. To the greatest extent possible there

local service providers, the federally funded AFLA programs -- instead of fostering family and community structures -- may bring about even further erosion of those very institutions.

The government may not, as Congress has done with the AFLA, deny government funding on the ground that a grant applicant has engaged in constitutionally protected activity with sources of funds independent of the government program at issue. In Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), aff'd in part rev'd in part after remand, 789 F.2d 1348 (9th Cir.), aff'd mem. sub nom. Babbitt v. Planned Parenthood, 107 S. Ct. 391 (1986), for example, this Court summarily affirmed a holding that Arizona may not deny grants to

should be consistency in the approaches utilized in new and existing programs that deal with the problems of adolescent sexual activity and pregnancy.

S. Rep. No. 161, 97th Cong., 1st Sess. 16 (1981)(emphasis added).

Planned Parenthood so as to "unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities" funded by independent sources. Id. at 944.

Similarly, in Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1985), the Court invalidated a government ban on editorializing by radio stations receiving federal grants, in part because the ban would have prohibited a station "from using even wholly private funds to finance editorial activity." Id. at 400. "Where . . . a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease . . . the first amendment interest served by such speech [is] paramount." Bolger v. Youngs Drug Products Corp., 436 U.S. 60, 69 (1983). The government may not use its pregnancy prevention program to silence grant

applicants who, while working to further the purpose of the Act, also wish to disseminate information about contraception and abortion, particularly when this activity is supported by non-AFLA funds.

2. The AFLA scheme results in government-funded misinformation that is designed to misguide and intimidate adolescents.

The AFLA requires that grantees, systematically and without notice to program participants, withhold information about contraceptives and abortion.²² The record is clear

²² Former Senator Jeremiah Denton, originator and key proponent of the AFLA, faulted prior federal family planning programs on the theory that exposure to accurate medical information regarding abortion and birth control causes increased sexual activity among young men and women. Senator Denton and the bill's co-sponsors presented the AFLA as an alternative to programs funded under Title X of the Public Health Service Act of 1984. They explained that the AFLA demonstration projects were explicitly designed to curb teen access to such information, while simultaneously enlisting religious groups in a state-sponsored effort to urge upon young adults those "moral values" of which Senator Denton and the other sponsors approved. See

that the AFLA has effectively silenced speech essential to reproductive decisionmaking. It has preempted the provision of accurate medical information to health care recipients by physicians, nurses, social workers and educators, rendering them mere agents of state-funded and religious ideology -- ideology which is, moreover, frequently at odds with sound medical practice. Dr. Louis Laz, an obstetrician-gynecologist at AFLA grantee St. Margaret's, described the frequent conflicts he faced between standard ethical

S. Rep. No. 161, 97th Cong., 1st Sess. (July 21, 1981). See also Examination of the Role of the Federal Government in Birth Control, Abortion Referral, and Sex Education Programs: Hearings Before the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 3 (Mar. 31, 1981); An Overview of the Adolescent Pregnancy Problem: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 171 (Apr. 24 and 26, 1984); Consideration of the Reauthorization of Title X of the Public Health Service Act: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 270, 292 (Apr. 5 and May 1, 1984).

medical practice and the directives of the Catholic hospital:

The religious directives forbid doctors at St. Margaret's from performing, prescribing, recommending or even referring for sterilization, abortion, or contraception even though these options are critical for the vast majority of obstetrical or gynecological patients The fetus or embryo is treated as a separate human patient whose treatment often imperils women's health and lives Teenagers are not informed that an abortion is many times safer for them, in terms of risks to their lives, than continued pregnancy and childbirth. Women who have added childbirth risks imposed by cancer, heart problems, extreme obesity, lupus, diabetes, sickle cell disease, mental conditions, hypertension, to name a few, are never informed about abortion which might be medically indicated.

J.A. 527-28 (Laz Affirmation) (emphasis added).²³ Dr. Laz further enumerated several

²³ The absolute ban on abortion counseling is contrary to the most basic standards of medical ethics which require that doctors discuss with their patients all available medical options and provide all information pertinent to the patient's exercise of informed consent. The total censorship of information about abortion, combined with

examples of distorted information provided by the hospital:

The curriculum also lists complications and side-effects of the diaphragm, including toxic shock, which has never been proven. There is no association between spermicides, which are used in conjunction with the diaphragm, and the future development of congenital abnormalities The curriculum is very misleading in that it does not discuss any of the benefits of contraceptives except the benefits of natural family planning, for which no side effects are shown, even though natural family planning is a method that must be used in conjunction with a regular partner, and has never been used successfully with teenagers.

subsequent pressure to surrender the infant, will coerce choice and subject women to increased medical and psychological risk. See Brief Amici Curiae of the American Public Health Assoc., *et al.*, in Support of Appellees, Point I. See Colautti v. Franklin, 439 U.S. 379 (1979) (standard of care provision requiring physician to employ abortion technique which would most likely result in live fetus struck down as unconstitutionally vague and unduly restrictive of physician's exercise of discretion); Doe v. Bolton, 410 U.S. 179, 192 (1973) (Physician's discretion should be "exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient.")

Id. at 534-35. Materials used by the Families of the Americas Foundation in its AFLA-funded "Adolescent Sexuality Program" define abortion as "[t]he premeditated killing of an unborn baby in the mother's womb during the period of gestation by artificially inducing the expulsion of the baby so that it does not survive." J.A. 587. In an obvious attempt to intimidate young women, the Foundation furnishes them with a highly misleading list of possible "immediate complications" of early abortions, including

laceration of cervix, hemorrhage, perforated uterus, laceration of urinary bladder and ureters, air embolism, laceration of bowel, shock, transfusion reactions, laparotomy, hysterectomy, retained tissue, death, cardiac arrest, bronchial obstruction, and anaphylactic shock.

Id. at 587-88. The materials continue with a lengthy list of "Immediate Complications" for late abortions, both saline and hysterotomy, as well as "Delayed Complications" and

"Effects on Later Pregnancy." Id. at 588-89. The materials do not acknowledge that the likelihood of any such complications is minuscule;²⁴ nor do they list the risks attendant upon childbirth or the greater likelihood that childbearing may cause women, especially adolescent women, permanent health damage.²⁵ The harm of this misinformation is obvious when assessed in light of the limited access to information in this area, see text and notes pp. 26-30 supra, pp. 39-40 infra, especially for adolescents, see text and notes p. 44 infra.

As one court addressing this very issue

²⁴ See Roe v. Wade, 410 U.S. 113, 149 (1973) (the Court took judicial notice of the relative safety of first trimester abortions compared with the statistical health risks of continued pregnancy and childbirth). See also Lebold, Grimes and Cates, Mortality From Abortion and Childbirth: Are the Populations Comparable? 248 J.A.M.A. 188, 191 (1982).

²⁵ See generally Brief Amici Curiae of American Public Health Assoc. et al., at Point I. B. for a discussion of the medical assessment of risks.

stated, the Constitution "does not permit the state to attempt to persuade women to decide not to terminate their pregnancies by keeping them in ignorance." Planned Parenthood v. Kempiners, 531 F. Supp. 320, 332 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir.), aff'd on remand, 568 F. Supp. 1490 (1983). Where, as here, the regulated speech concerns a controversial but protected activity the government's authority to interfere through state-approved ignorance or misinformation is particularly limited. See Carey v. Population Serv. Int'l, 431 U.S. 678, 700 (1977).²⁶

²⁶ This Court has held that ". . . above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972), quoted in Arkansas Writers' Project v. Ragland, 107 S.Ct. 722, 727 (1987). The government cannot, therefore, discriminate between viewpoints or ideas, nor can it prohibit discussion of an entire topic. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537 (1980). See Arkansas

The importance of the right to receive ideas²⁷ was emphasized in the Supreme Court's decision invalidating the removal of certain library books by public school officials. Board of Education, Island Trees Union Free School District v. Pico, 473 U.S. 853 (1982). The Court noted that the right to receive information is a necessary corollary to the writer's right to speak. Id. Here, a govern-

Writers' Project, 107 S.Ct. at 727; Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 384 (1985); Metromedia Inc. v. San Diego, 453 U.S. 490, 518-19 (1981) (plurality opinion). "[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available [medical] knowledge." Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

Regardless of its motive, the government may not choose to further even a legitimate governmental interest "by keeping the public in ignorance of . . . entirely lawful," medical options, such as contraception and abortion. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

²⁷ The right to receive information and ideas uncensored by the government has long been acknowledged by this Court. See Kleindienst v. Mandel, 408 U.S. 753 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Martin v. Struthers, 319 U.S. 141 (1943).

ment gag-order²⁸ prevents young women and their parents from speaking candidly with educators, counselors, and health practitioners, in order to pursue intelligently a course of action with regard to the young woman's sexual activity, reproductive health, and life decisions.²⁹ This is most harmful to the young adults whose decision when and whether or not to bear a child is one of the most

²⁸ See also Valley Family Planning v. North Dakota, 489 F. Supp. 238, 242 (D.N.D. 1980), aff'd on other grounds, 661 F.2d 99 (8th Cir. 1981). (Citing Carey v. Population Serv. Int'l, 431 U.S. at 700 (state may not completely suppress dissemination of . . . truthful information about entirely lawful activity," quoting Virginia Pharmacy Board, 425 U.S. 748 at 773).

²⁹ This thwarts the efforts of those attempting to form beliefs about issues which are often debated in the public arena. Cf. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (noting protected status of information needed or appropriate for coping with the exigencies of the period); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

important decisions they may make.³⁰

B. The AFLA Unconstitutionally Burdens Young Women's Right of Choice in Matters of Contraception and Reproduction.

The government-funded AFLA program interferes with the fundamental right identified in Roe v. Wade, 410 U.S. 113 (1973), of a woman to choose whether or not to terminate her pregnancy, as well as the correlative right of access to information about contraceptives recognized in Carey v. Population Serv. Int'l, 431 U.S. 678 (1977). U.S. Const. amend. V. This interference is further reinforced by the government's decision to enlist, in pursuit of its purpose, the aid of

³⁰ See Thornburgh v. ACOG, 106 S. Ct. 2169, 2185 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy") Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 74 n.30 (1983). ("The right to privacy in matters affecting procreation also applies to minors . . . [and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception.")

religious organizations that oppose abortion.
42 U.S.C. Sec. 300z-10(a).

1. The AFLA Unconstitutionally Interferes With Informed Consent of Program Participants.

Insofar as the AFLA prescribes a unitary and authoritarian "solution" for all pregnant young women -- that of carrying an embryo to term -- and proscribes the free flow of information about alternative options from medical personnel, it impermissibly usurps the counseling role of the physician, and places a profoundly "chilling effect on the exercise of a constitutional right." Colautti v. Franklin, 439 U.S. 379, 394 (1979). See also City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting) (noting that certain "informed consent" provisions which effectively require a physician to parrot state ideology may constitute a first amendment violation.)³¹

In Akron, this Court disparaged the statutory prescription of "a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." Id. at 445. The Court continued, "It is not disputed that individual counseling should be available for those persons who desire or need it . . ." Id. at 448 n.38. (emphasis added). See also Colautti v. Franklin, 439 U.S. 379 (1979).

The Court in Akron invalidated an "informed consent" provision requiring the physician to inform the woman, *inter alia*, that "the unborn child is a human life from the moment of conception" and that "abortion is a major surgical procedure." Akron, 462

³¹ The AFLA's restrictions on abortion speech translate into conditions of employment for AFLA grantee medical personnel. See e.g., J.A. 526, 550.

U.S. at 445. The provision included a list of possible health complications -- a "parade of horribles" -- which the Court characterized as "intended to suggest [the dubious idea] that abortion is a particularly dangerous procedure." *Id.* This Court invalidated it, noting that the requirements had been "designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Akron*, 462 U.S. at 444 (emphasis added). Using similar reasoning, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court upheld an informed consent provision that it found to encourage accurate and complete counseling, because "the decision to abort . . . is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Danforth*, 428 U.S. at 67 (emphasis added). See also *Thornburgh v. ACOG*, 106 S. Ct. at 2178.

The invalid *Akron* provisions are strikingly similar to the instruction prescribed in the AFLA programs -- the very kind of "litany" designed not to inform, but to mislead. Accordingly, the AFLA scheme, which is designed to withhold full knowledge about abortion from program participants, cannot be upheld.

2. The AFLA's Funding Scheme Impermissibly Coerces the Minor's Reproductive Life Decisionmaking.

This Court has previously noted that minors (as well as parents, who are often a primary source of guidance to their children), have an especially acute need for truthful information about sexuality and pregnancy.³²

³² As the Court recognized in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 75 n.30, "adolescent children apparently have a pressing need for information about contraception." Thus, the statute at issue in *Bolger* prohibiting advertising about contraception was struck down because it inhibited the free flow of truthful information and denied adolescents and their parents the ability to discuss birth control and make informed decisions about sex. *Id.* at 74. Cf.

"[T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." Bellotti v. Baird (Bellotti II), 443 U.S. 643 (1979).

The Act's restrictive funding scheme is designed to ensure that at least one of several possible obstacles will ultimately prevent a pregnant adolescent from considering or obtaining an abortion. In the case of those AFLA programs which prohibit any mention of abortion as an alternative to bearing a child, the adolescent will be kept ignorant of that option.³³ In the case of those programs

Carey, 431 U.S. at 678 (provision prohibiting parents from distributing birth control to children is invalid).

³³ See, e.g., J.A. 484 (Lyon County Health Department's teaching manual states: "Discussion [of abortion] not included because

which do include a discussion of abortion, the presentations are biased so as to steer the teenager into the predetermined course of behavior of carrying to term.³⁴ Even a

it is not an option to consider") (emphasis in original); J.A. 553 (Maisenbacher Affirmation) (Pregnant teens are "very ignorant" when they arrive at St. Margaret's Hospital and are "encouraged to become dependent on an institution which will deliberately perpetuate their ignorance by giving only medical procedures and information consistent with Catholic directives"). See also pp. text and notes p. 26 supra.

³⁴ The program descriptions are filled with seemingly benign language about supplying minors not merely with facts, but with values; when one realizes, however, that "the very purpose of religion is to transmit certain values," J.A. 597 (Simmons Affirmation), it becomes evident that the religious mission of funded groups and the *raison d'être* of the AFLA are one and the same. Because of the impermissible fusion of the secular and the religious effected by the Act, good "values" and "accurate" decisions are, under this scheme, synonymous with being a "better Christian" and with living life "as God intended." J.A. 636-37 (excerpts from St. Margaret's curriculum); J.A. 633 ("Sometimes there are good sources of information, but other times the messages may not be accurate or present sexuality as special and important . . . shows we see on television or at the movies are not real life but make-believe and do not present sexuality as God

teenager who is somehow independently aware of abortion (and/or contraception) as an option may be too intimidated to inquire about either, because of the pervasively religious nature of the locale,³⁵ the presence of clergy performing religious functions or in their traditional garb,³⁶ the decided preference for childbearing and motherhood reflected in

intended.") (emphasis in original). See also text and notes pp. 11-15 supra.

³⁵ For example, St. Margaret's Hospital contains crucifixes and religious symbols and statuaries throughout the buildings and grounds. J.A. 552-53 (Maisenbacher Affirmation); J.A. 485 (AFLA "program at one parochial school and a local Lutheran Church were held in rooms where religious symbols were displayed").

³⁶ See, e.g., J.A. 568 (Pastor William J. Ingersoll's letter confirms that the addressee of the letter will "meet with the parents and youth" to cover various topics, "followed by a brief presentation by myself of Biblical and theological views regarding sex.") For complete listing of instances in which clergy and/or visibly religious employees were present during orientations or the actual workshops, see R. 155, 61-62 n. 102 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment).

program materials,³⁷ the often inaccurate and inflammatory description of the abortion procedure and its consequences,³⁸ the similarly inflammatory or inaccurate description of contraceptives,³⁹ or some combination of

³⁷ See, e.g., L.D. 11 (Current grantee Christian Family Care Agency materials advise pregnant woman that abortion "is not the answer to a crisis pregnancy . . . Deciding to give your baby life is a loving, courageous decision . . ."). See also J.A. 513 (Catholic Family Services AFLA grant application states that "[t]he client will not be counseled to terminate the pregnancy, although caseworkers do discuss a client's feelings about abortion and the detrimental effects abortion can have on the physical and emotional well-being of the client, as well as the destruction occurring to an unborn infant").

³⁸ See, e.g., pp. 26-29 and n. 14 supra. L.D. 77-78, 86-100 (Current grantee, A Woman's Choice distributes materials with facts and statistics by exaggerating the possibility of remote complications from abortions.)

³⁹ See, e.g., J.A. 522 (Student Evaluation of AFLA course states: "I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip . . . [the teacher] spent so much time on the natural family planning (rhythm method) [sic] as a good thing because the Church approves it but she failed to mention

those factors. The dissemination of misinformation (or failure to provide essential information), in the "care" programs is particularly coercive as it takes place during the limited and stressful time period when a woman is deciding whether or not to continue her pregnancy. But even in the "prevention" programs -- the teenage sexuality education programs -- the government preempts by hidden force the woman's decisionmaking process through systematic and calculated misinformation as well as other coercive strategies.

The magnitude of the government's incursion on this decisionmaking process is all the greater because it affects women who are at a critical juncture in the formation of their personalities and moral development.

By funding such "education" and "care" programs, the AFLA clearly flouts this Court's

that it is not good for teenagers to use this method -- it's not really safe.") (emphasis added).

frequently stated mandate that government refrain from exerting undue influence, through physicians or otherwise, on a woman's decisionmaking with respect to contraception and abortion. "The states," however, "are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Thornburgh v. ACOG, 106 S. Ct. at 2178 (1986). Nor may government constitutionally discourage use of contraceptives by hiding or distorting information about them.⁴⁰

⁴⁰ In Carey v. Population Serv. Int'l, 431 U.S. 678, the State of New York sought to justify a statute prohibiting distribution of contraceptives to those under 16 on the basis that the law would deter sexual activity among minors in that age range. This Court flatly rejected such a rationale, taking judicial notice that minors do have sexual relations and with "frequently devastating" consequences. Id. at 695-96. Concurring in part and concurring in the judgment, Justice Stevens pointed out the danger and irrationality of imposing on individuals a rigid ideology that simply ignores reality:

Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on

If forced ignorance and intimidation fail to keep the teenager from raising the question of abortion, the teenager who requests abortion counseling or referral cannot, by the terms of the statute, receive it unless both of her parents (or guardians) also "request" it. 42 U.S.C. Sec. 300z-10(b). This provision constitutes a further obstacle, which in practice operates, even for the mature and/or emancipated minor, as a parental consent requirement without the alternative avenues constitutionally required. Moreover, if a teenager, unaware of the anti-abortion restriction on funding, requests abortion

the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though the State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Id. at 715.

services (or any other service, for that matter), the Act requires both notification to and permission of parents or guardians,⁴¹ with only three narrow exceptions. 42 U.S.C. Sec.

⁴¹ The AFLA is touted as representing an "innovative" approach, depending primarily on "developing strong family values and attitudes of adolescents concerning sexuality and pregnancy . . ." 42 U.S.C. Sec. 300z-(a)(10)(A). When one compares the rhetoric, however, with the actual design of the statute it becomes apparent that family "values and attitudes" receive the government's approval only if they comport with the narrow anti-abortion ideological message which Congress intended to further by the Act. For example, Sec. 300z-5(a)(22)(A)(ii) provides that "in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor . . . within a reasonable period of time . . ." Yet, the Act also specifically prohibits parental notification in the case of a pregnant unemancipated minor if a grantee has reason to suspect that "such parents or guardians are attempting to compel such minor to have an abortion." Sec. 300a-5(a)(22)(C) (emphasis added). This provision is not a neutral one designed to protect the minors' fundamental rights to procreative choice-making free from compulsion. There is no corollary provision in the case of parents attempting to "compel childbearing and/or adoption." Clearly, Congress has determined that parental involvement is desirable only if the parents will further the statute's ideological agenda.

300z-5(22)(A),(B). In the case of abortion, this provision can only serve a punitive purpose, since the AFLA grantee by definition will not, in any event, provide such a service.

3. Given That it Interferes With Privacy Rights, The AFLA is Not Sufficiently Narrowly Tailored to Withstand Constitutional Scrutiny

Each of the barriers to access to or use of contraception built into the statute and manifested in the "prevention" and "care" programs is, independently, far more than a mere expression of policy favoring childbirth over abortion. See Harris v. McRae, 448 U.S. 297, 325 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977). Rather, each acts as an affirmative, state-created obstacle in the path of a woman's right to decide for herself whether or not to bear a child. This right is no less fundamental for minor women than for adult

women.⁴² Statutes burdening that right cannot withstand constitutional scrutiny unless they satisfy an "important" state interest, and unless the means are narrowly drawn to serve only that interest. See H.L. v. Matheson, 450 U.S. 398, 413 (1981). The legislative purpose of curtailing adolescent sexual activity may be an important state interest, but the strategy of achieving that purpose by promoting ignorance, fear, guilt and misinformation is not narrowly tailored to serve that

⁴² City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating blanket rule which treats all minors under 15 as too immature to make abortion decision and which denies opportunity to show that abortion is in minor's best interests without parental consent); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) (no third party, including parents, may exercise absolute veto power over minor's decision to seek abortion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding unconstitutional statute requiring that unmarried minors under 18 obtain parental consent for abortion).

interest, and indeed defeats that interest.⁴³ Experts on the subject have long recognized that adolescents do not respond well to moralizing and that the object of any teen pregnancy program must be clarification of an

⁴³ The premise of the AFLA is that there is a causal relationship between access to accurate information about contraception and increased promiscuity, and an increase in the rates of pregnancy, abortion and childbirth among teens. One expert on adolescent pregnancy calls this presumed relationship between family planning availability and increased promiscuity "spurious." She writes, "[t]here is no evidence that the availability of family planning services increases sexual activity among female teenagers; however, it does appear to improve contraceptive use and reduce their chances of having an unplanned pregnancy and out-of-wedlock birth.", Hofferth, The Effects of Program and Policies on Adolescent Pregnancy and Childbearing, reprinted in 2 Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, 225, 260, (Hofferth & Hayes, eds., 1987) (National Research Council publication). Another study found that residence in a southern state was the most important predictor of high adolescent fertility and related that fact to, among other things, the higher proportion of Fundamentalists in that area and to the fact that southern states allot relatively little money to education and welfare and that abortions are less available in the South. Morgan, Interstate Variations in Teen Fertility, 2 Population Res. and Pol'y Rev. 72 (1983).

adolescent's own values. Studies as well as common sense indicate that if adolescents are made to feel guilty about sex, they will shun taking any precautions, since doing so would be tantamount to an admission of sexual activity:

A conflict exists because the attitude of the adolescent is that sex is all right and the person or situation is right, but the moral code of most parents stipulates that premarital sex is wrong. Behaviorally, however, the adolescent is sexually active. The discrepancy that exists between actual behavior and moral upbringing is often evident in the percentage of adolescents who routinely do not use any type of birth control and are surprised when they become pregnant. The adolescents feel that if they do not use contraception and are swept away on the spur of the moment, then sexual behavior is acceptable. Planning sexual activity conflicts with the moral code of their parents and their own confused beliefs and values.

Tauer, Promoting Effective Decision Making in Sexually Active Adolescents, 18 Nursing Clinics of North America 276 (1983) (footnote omitted). Therefore, despite the government's

legitimate interest in reducing rates of adolescent pregnancy, the approach it has adopted through the AFLA is not likely to instill the sense of responsibility and autonomy in teenagers that many feel is essential to stemming the problem of unwanted teen pregnancy.

The emphasis on bringing out the adolescent's own values is based not only on the abstract ideal of respect for individual conscience,⁴⁴ but also on the practical realization that this is the only way for young adults to develop the self respect and self confidence necessary to act responsibly and with an understanding of the consequences of their acts: "The harmony between one's

⁴⁴ The first amendment embodies a promise based on just that "abstract ideal"-- that under the newly-formed constitutional system, the federal government would be required to treat its citizens with respect. See Record Docket Entry 155 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment 8-12).

beliefs and one's choices and the realization that the adolescent himself has made the choice will help him to be an active participant in his own health care." Tauer, supra p. at 280. This Court has recognized that the absolute imposition of external values on minors -- whether it be the values of parents, judges, physicians, or religion-- is constitutionally intolerable.⁴⁵ It is also a way to ensure minors' dependency and continued ignorance. More than a moral authority, "[t]he adolescent needs a neutral

⁴⁵ In his concurring opinion in Bellotti v. Baird (Bellotti II), 443 U.S. 662 (1979), Justice Stevens noted the constitutional difficulties inherent in the judicial bypass procedure, which required that a judge apply the value-laden standard of "best interests of the minor." This standard was of little guidance, he wrote, because "[the judge's] decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor -- particularly when contrary to her own informed and reasoned decision -- is fundamentally at odds with the privacy rights underlying the constitutional protection afforded to her decision." Bellotti II, 443 U.S at 655-56 (Stevens, J., concurring in judgment).

ally who can help her evaluate the pros and cons of various choices. Such an ally needs to be able to tolerate her ambivalence toward the pregnancy and her relationship to her parents and other significant authority figures." Adler, Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women, 12 Professional Psychology 63 (1981).

The existence of successful programs which encourage teens to abstain from or delay sexual relations, but also counsel on birth control and abortion, should leave no doubt that Congress has not here chosen the least intrusive means for achieving the goal of promoting abstinence among teenagers. For example, "Teen Choice" is a sexuality education and counseling program conducted in seven New York City public schools by Inwood House, a home for unwed mothers. The program "encourages teens to delay having sex," but [s]ources for birth control are given when it becomes obvious that

the girl plans to have sex -- with or without birth control. A similar process takes place if a girl turns to a counselor for advice on an abortion.

"Whether we favor it or not is really irrelevant," said Dominique Moyse-Steinberg, a Teen Choice counselor at Brandeis. "What's really important is option counseling [to ensure] that what is done is done of her own free will."

Education Research Group, Teen Pregnancy: Impact on the Schools 50 (R. Weiner ed. 1987) (A Special Report).⁴⁶ In sum, by treating

⁴⁶ Tauer echoes the theme of free will and focuses on the importance of treating adolescents as capable, independent moral and intellectual agents:

If we believe that the only way to promote effective decision-making in adolescents is to help them to understand what is valuable in their own life and to use that as a base for making decisions, then we can no longer spoon-feed information to them. We must take into account the cognitive, social, emotional, and sexual development of adolescents, and only by being aware of them as growing, changing persons will we be able to effectively help them to choose how to live their lives. If their choice is to be sexually active and they are in accord with their beliefs and it is a choice that they have made freely, after

teenagers as morally and intellectually incompetent to make intimate decisions about their lives, the statute makes that harsh judgment a self-fulfilling prophecy.

Moreover, the AFLA is constitutionally defective in its requirement that both parents (or guardians) "request" abortion counseling or referral, in order for the adolescent to receive either. 42 U.S.C. Sec. 300z-10(a).

This so-called "exception" is virtually

understanding all of the alternatives and accepting the outcome, then we must accept that choice. If their choice is not to be sexually active and is based on their own belief system and is a choice freely made by examining all the alternatives and understanding the outcome, then we must also support that decision. The health professional must strive to help adolescents learn to make decisions based upon their own beliefs and value systems, to guide them to an understanding of where they are in their development, to not moralize or preach; to understand what sexuality means to the adolescent and not merely to emphasize physiological aspects of sex.

Tauer, supra p. 51, at 280.

meaningless in light of the absolute prohibition on funding to groups that in any way countenance abortion.⁴⁷ Regardless of what the statute may permit technically, many AFLA-funded health care providers hold anti-abortion beliefs, and thus cannot, in accordance with those beliefs, provide the requested information. Even in the case of an AFLA-funded health care practitioner who may

⁴⁷ See also Sec. 300z-5(22)(A)(i), requiring, subject to certain exceptions, that AFLA grant applicants provide assurances that they will "notify the parents or guardians of any unemancipated minor requesting services . . . [and] will obtain the permission of such parents or guardians with respect to the provision of such services." As for pregnant unemancipated minors requesting services, applicants must provide the additional assurance that parents will be notified "within a reasonable time." Sec. 300z-5(22)(A)(ii). This provision is, quite transparently, designed to deter minors who would prefer not to involve their parents, from requesting certain services, including abortion. Clearly, however, parental involvement is paid lip service only; it is hindered where parents favor the dissemination of honest abortion-related information as such involvement will not further the coercive purposes of the Act. See note 41 supra.

not strictly adhere to anti-abortion strictures, there is no mechanism in the statute to ensure that he or she will be made aware of the exception. See J.A. 550 (Maisenbacher Affirmation).⁴⁸

⁴⁸ Ms. Maisenbacher, a registered nurse formerly employed as a midwife in the AFLA-funded St. Margaret's Teenage Pregnancy Program, noted the inefficacy of the exception which she defined as requiring parental "consent":

In my employment interview I was told both by Nancy Barrows, director of Nurse-Midwives, and the personnel director, that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities", (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job. Although I understand that the Adolescent Family Life Act permits teenagers to get information and referral for contraceptives with parental consent, and abortion referrals upon parental request, I was not informed of this when I worked at St. Margaret's and it is clear that even providing such limited information would breach the

Moreover, the parental "request" exception, in practice, operates no differently than an unconstitutional parental consent requirement. It represents the last of a series of obstacles set by the Act in the path of a woman attempting to make a personal decision. Minors have a right of access to information directly affecting their reproductive lives. Carey v. Population Serv.

hospital rules as explained to me.
Id. at 550. (emphasis added).

⁴⁹ H.L. v. Matheson, 450 U.S 398 (1980), is not to the contrary. The statute upheld in that case required parental notice only "if possible," and the Court made clear that the Utah statute did not grant parents veto power over the minor's abortion decision, which would have been constitutionally impermissible. Id. at 411. The AFLA's vague "request" provisions, however, apparently require parents to come forward and, either orally or in writing, state an interest in receiving information about abortion. Obviously, parents would not do so unless they might approve of an eventual abortion. Moreover, the Matheson Court did not extend its holding to mature or emancipated minors, or to immature minors who could demonstrate that notification would be detrimental to their best interests. Id. at 406-07 n.14.

Int'l, 431 U.S. 678. Insofar as access to information is a prerequisite to the ability to obtain an abortion, the parental "request" requirement violates the well-established principle that where government requires parental consent to the minor's abortion decision, it "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." City of Akron, 462 U.S. at 439-40.⁵⁰

⁵⁰ See Bellotti II, 443 U.S. at 644 (explaining that the judicial by-pass procedure would provide an alternative to parental consent whereby a minor would have an "effective opportunity" to secure an abortion with anonymity); Carey v. Pop. Serv. Int'l, 462 U.S. at 688-89 (holding that the right of access to contraceptives "is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade"). See also Bolger v. Youngs Drug Products Corp., 463 U.S. at 69 (holding that the first amendment prohibits government from

The deliberate withholding of vital and accurate information about contraception and abortion required by the AFLA constitutes a state-created obstacle in the path of a woman's right to make her own reproductive life decision. Enforced ignorance is at least as formidable an obstacle in that path as criminal penalties (Roe); spousal consent requirements (Danforth); parental consent

inhibiting the flow of truthful information where that information "relates to activity which is protected from unwarranted state interference").

It is immaterial that the AFLA does not bar all available channels through which adolescents may learn about abortion. The Constitution forbids government to exceed certain limits defined by this Court. It simply does not matter for constitutional purposes whether that limit has been exceeded partially or thoroughly. As this Court once explained in a slightly different context, "one is not to have the exercise of his liberty . . . abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 63 (1939). See also Carey, 431 U.S. at 697 (1977) ("less than total restrictions on access to contraceptives that significantly burden the right to decide whether or not to bear children must also pass constitutional scrutiny").

requirements amounting to veto power (Bellotti I);⁵¹ second-trimester hospitalization requirements (Akron); and distorted informed consent provisions (Akron, Thornburgh). The concerted effort of government and religion to impose one preferred set of values on young women operates as a subtle but profound veto on individual autonomy and self-determination.

CONCLUSION

This Court should affirm the district court judgment on establishment clause, free speech and privacy grounds and modify the order to strike down the AFLA in its entirety as unconstitutional.

Respectfully Submitted,

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Counsel of record and amici curiae acknowledge and thank Jennifer C. Pizer, New York University Law School, J.D. 1987; Doreena Wong, New York University Law School, J.D. 1987; Anne Zinkin, New York University Law School, J.D. degree expected 1988; Lisa Swanson, Lyn McCoy and Lynn Thorp.

⁵¹ Bellotti v. Baird, (Bellotti I), 428 U.S. 132 (1976).

APPENDICES

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Curiae
- B. Interest of Amici Curiae
- C. Certificate of Service by
Counsel of Record
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APPENDIX A

**Letters of Consent to the Filing of
the Brief Amici Curiae**

U.S. Department of Justice
Office of the Solicitor General



Washington, D.C. 20530

February 1, 1988

Jennifer C. Pizer, Esquire
Legal & Research Director
National Abortion Rights
Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: Bowen v. Kendrick, et al.
Nos. 87-253, 87-431, 87-462 and 87-775

Dear Ms. Pizer:

With regard to your letter of January 25, 1988, I hereby consent to the filing of an amicus brief in the above case on behalf of the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and possibly other organizations.

Sincerely,

Charles Fried
Solicitor General

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

REPRODUCTIVE FREEDOM PROJECT

February 8, 1988

Jenny Pizer
Legal & Research Director
N A R A L
1101 14th Street, N.W.
5th floor
Washington, D.C. 20005

re: Bowen v. Kendrick
87-253, 87-432,
87-462, 87-775

Dear Ms. Pizer:

Pursuant to your request, Cross-Appellants Chan Kendrick et al., herein consent to the filing of a brief amicus curiae in the above-captioned case by the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and such other groups as may wish to join.

Sincerely,

Janet Benshoof
Attorney for Cross-Appellants

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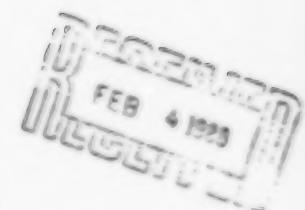
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February 1, 1988

Ms. Jennifer C. Pizer
Legal & Research Director
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1101 14th Street, N.W., 5th Floor
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Dear Ms. Pizer:

On behalf of United Families of America, I am happy to give my consent to your filing an amicus curiae brief in Bowen v. Kendrick and the consolidated cases, Nos. 87-253, 87-431, 87-462, and 87-775.

Very truly yours,

Michael W. McConnell
Assistant Professor of Law
Counsel of record, United
Families of America

APPENDIX B

Interest of Amici Curiae

INTEREST OF AMICI CURIAE

The NOW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The National Abortion Rights Action League (NARAL) is a national organization with more than 200,000 members in 34 state affiliates and the national organization. Because NARAL believes that reproductive self-determination is central to the lives and health of women, NARAL educates the public and policymakers about the importance of creating social conditions that allow women to exercise freely the full range of their reproductive choices.

The American Association of University Women, a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW supports basic constitutional rights for all persons, including first amendment rights of free speech and separation of church and state, the right to privacy, and equal protection under the law. The right to reproductive choice continues to be a priority issue for AAUW.

The American Humanist Association is a non-profit national educational organization of persons in every state of the Humanist philosophy. The AHA strongly supports freedom of conscience and the principle of separation of church and state. The AHA believes that the AFLA violates both the establishment clause and the right to privacy protected by the fourteenth amendment.

Americans for Religious Liberty is a nationwide, non-profit, educational public interest organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. AFLA believes that the AFLA violates the establishment clause by providing tax support to sectarian institutions and violates the privacy rights of intended beneficiaries by providing them with distorted information.

The Black Women's Agenda is a private non-profit organization which aims to improve the status of black women and their families. The BWA is interested in Bowen v. Kendrick because of AFLA's impact on low-income black girls and their access to information consistent with reproductive freedom.

B'nai B'rith Women, Inc., founded in 1897, is a non-profit charitable, religious, and educational organization of over 125,000 women. Among its purposes, as reflected in its bylaws, is to "give guidance to youth on the broadest principles of humanity." It has implemented that purpose through a specific program designed to meet the rise of teenage pregnancies through educational programs for parents and adolescents.

The Center for Law and Social Policy is a public interest law firm which provides representation to women, minorities, the disabled, and the poor on issues of family law and policy. Our work has confirmed that teen pregnancy can have especially devastating consequences for poor teenagers and lead to economically insecure families. In light of this reality, a crucial component of any rational family planning policy must be the preservation of service providers' flexibility

to offer counseling to pregnant teenagers that gives them the ability to make informed choices best suited to their circumstances.

The Committee to Defend Reproductive Rights is a San Francisco, community-based organization with 1,000 members throughout California and several other states. For ten years, CDRR has been dedicated to insuring women's reproductive freedom by engaging in public education issues concerning reproductive rights. CDRR supports and defends the reproductive right and freedom of all women, including young women.

Equal Rights Advocates, Inc. is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

The National Emergency Civil Liberties Committee is a non-profit organization, dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time, the NECLC submits amicus curiae briefs to the Court when it believes issues of particular import to civil liberties are at stake.

The National Organization for Women (NOW) is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a

leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion.

The National Women's Health Network serves as an advocate for women whose voices are not heard in the creation of health policies at the federal level. Given that young women's health education needs were to be a goal of this federal program, the National Women's Health Network wishes to voice its concern that young women's needs be truly met and not encumbered by religious teachings.

The National Women's Political Caucus is a non-profit corporation supporting the election and appointment of women to public office. It also supports legislative and public policy issues of concern to women, such as freedom of choice an reproductive rights, the Equal Rights Amendment and economic and legal equity for women.

The Northwest Women's Law Center is a private, non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, education, and providing information and referral. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court.

The United States Student Association is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

Voters for Choice is the only national, independent pro-choice political action committee. Voters for Choice works directly with campaigns, providing both contributions and vital technical assistance to candidates in dealing with reproductive rights issues.

The Women's Law Project is a non-profit feminist law firm dedicated to advancing the status and opportunities of women through public education, litigation, advocacy and research. The WLP has played a leading role in defending reproductive rights in the courts, including representing plaintiff women and medical providers in Thornburgh v. ACOG, ___ U. S. ___, 106 S.Ct. 2168 (1986).

The Women's Legal Defense Fund is a tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

Zero Population Growth is a national non-profit, membership organization that works to mobilize broad public support for population stabilization both in the U.S. and worldwide. ZPG supports laws and social practices that ensure access for all women to voluntary family planning services as well as medically safe and affordable abortion services.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae NOW Legal Defense and Education Fund, et al., together with a copy of the Lodged Documents referenced therein at note 2, to be served by first class mail postage prepaid upon:

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on or before February 13, 1988.

S/
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NOW Legal Defense and
Education Fund, et al.

APPENDIX D

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FEB 13 1988

STATE'S SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, ET AL.,

*Appellees.**Caption continued on Inside Front Cover*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION,
AMERICAN PSYCHOLOGICAL ASSOCIATION, PLANNED
PARENTHOOD FEDERATION OF AMERICA, INC., AND
NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH
ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF
APPELLEES AND CROSS-APPELLANTS**

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February 13, 1988

UNITED FAMILIES OF AMERICA,

Appellant,

—v.—

CHAN KENDRICK, ET AL.,

Appellees.

CHAN KENDRICK, ET AL.,

Cross-Appellants,

—v.—

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, ET AL.,

Appellees.

UNITED FAMILIES OF AMERICA,

Appellant,

—v.—

CHAN KENDRICK, ET AL.,

Appellees.

CHAN KENDRICK, ET AL.,

Cross-Appellants,

—v.—

OTIS R. BOWEN, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF THE AMERICAN PUBLIC HEALTH
ASSOCIATION, AMERICAN PSYCHOLOGICAL
ASSOCIATION, PLANNED PARENTHOOD
FEDERATION OF AMERICA, INC., AND NATIONAL
FAMILY PLANNING & REPRODUCTIVE HEALTH
ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT
OF APPELLEES AND CROSS-APPELLANTS**

INTERESTS OF AMICI CURIAE

The American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including consumers and health professionals such as physicians, nurses, health educators, and family planning specialists. APHA members seek to develop health policy that ensures equitable and quality health care for all, including pregnant and sexually active adolescents. The APHA has a particular interest in the Court's resolution of this case because the challenged Adolescent Family Life Act contradicts numerous APHA policy statements, including those supporting accurate public information on abortion (No. 8524), the right to informed consent (No. 7839), and counseling on all contraceptive methods in family planning programs (No. 8304).

The American Psychological Association ("APA"), a non-profit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees in the United States. APA's purposes are to advance psychology as a science and profession, and to promote human welfare. A central function of APA is to establish ethical standards and guidelines for the delivery of psychological services, including counseling on reproductive options. The Ethical Principles of Psychologists have been incorporated in the laws of most states, thus governing the professional conduct of psychologists licensed in those states.

Planned Parenthood Federation of America, Inc. ("PPFA"), organized in 1922, is the leading voluntary public health organization in the field of family planning. PPFA's 181 affiliates in 43 states operate over 700 family planning clinics offering services to the public. Most affiliates offer medical

services and 48 include abortion services as part of their program. Most affiliates that do not perform abortions offer pregnancy counseling and referral. All affiliates offer educational and informational services in voluntary fertility control. PPFA opposes restrictions on the accessibility of reproductive information and services because such restrictions are contrary to the public health and welfare. The adverse impact of an unwanted pregnancy is particularly acute for the adolescent because an early pregnancy entails substantial medical risks and often significantly limits her educational and career opportunities.

The National Family Planning and Reproductive Health Association, Inc. ("NFPRHA") is concerned with the improvement and expansion of family planning and reproductive health care services throughout the United States. Among NFPRHA's 900 members are consumers and health care professionals, including State, county and city health departments, Planned Parenthood Federation of America affiliates, hospital-based clinics, "umbrella" family planning councils, independent, free-standing family planning clinics and other family planning organizations and providers. Many of NFPRHA's members have sought AFLA funds and been denied because they refuse to abide by the anti-abortion and parental consent provisions. Other members have not even applied for AFLA funding, despite clear capabilities to deliver services under the Act, because they feared or were told that they had no chance of receiving funding on account of their objections to the anti-abortion and parental consent provisions.

This case raises issues concerning limits on the information that may be communicated to adolescents who are or may become sexually active, or pregnant. Many of the members of amici have conducted research on effective and ethical education for adolescents on sexuality, family planning, pregnancy, and abortion. The issues raised are of particular interest to amici because of their commitment to public health and their expertise in reproductive health education and counseling.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court.

INTRODUCTORY STATEMENT

Amici urge affirmance of the district court's finding that the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.* [hereinafter AFLA or the Act] is unconstitutional insofar as it requires the participation of religious organizations in AFLA programs. In addition, amici suggest that the statute presents such constitutionally sensitive questions as whether the AFLA is consistent, on its face and as applied, with the constitutional right to make reproductive decisions free from government interference.

When it enacted the AFLA, Congress recognized the manifold problems of adolescent pregnancy. The Act recites that pregnant adolescents experience:

a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher infant mortality and morbidity; a greater likelihood that an adolescent marriage will end in divorce; a decreased likelihood of completing schooling and higher risks of unemployment and welfare dependency. . . .

42 U.S.C. § 300z(a)(5). Unfortunately, Congress ignored these real concerns of adolescent pregnancy and childbirth and instead enacted a law which is not only medically unsubstantiated but violates the fundamental constitutional rights of pregnant adolescents.

The AFLA was enacted to serve several purposes:

(1) finding effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family members, and to promote self discipline and other pru-

dent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;

(2) promoting adoption as an alternative for adolescent parents;

(3) establishing innovative, comprehensive and integrated approaches to the delivery of care services for pregnant adolescents;

(4) supporting research and dissemination of research results on the causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy and childrearing.

42 U.S.C. § 300z(b).

To meet the purposes of the AFLA, grants are made to public and nonprofit organizations to fund "prevention services" for the prevention of premarital adolescent sexual relations and "care services" for the provision of care to pregnant adolescents and adolescent parents. 42 U.S.C. § 300z(1)(a) 7 & 8. Among the applicants' specific obligations under the AFLA is the involvement of religious organizations in the provision of services.¹ The merit of each grant application is judged on how

¹ Section 300z-5(a)(21)(B) requires that applicants provide a description of how the applicant will, as appropriate in the provision of services . . . involve *religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives* (emphasis added).

The Committee Report accompanying the bill passed to extend the AFLA explains:

"Current law *requires* applicants to involve religious and charitable organizations . . . in the development of projects and in the delivery of services."

Committee on Labor and Human Resources, The Adolescent Family Life Act, S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984) (emphasis added).

effectively the applicant demonstrates the involvement of religious organizations.²

In conjunction with its mandate to involve religious organizations, the AFLA prohibits the delivery of information on abortion.³ The only exception to the abortion prohibition is a provision that pregnant adolescents may receive referral for abortion counseling if both the "adolescent and the parents or guardians of such adolescent request such referral." 42 U.S.C. § 300z-10. While banning information on abortion, the Act instructs grantees to provide adolescents information about adoption. 42 U.S.C. § 300z-1(a)(4)(B) & (G)(i).

Only programs that provide biased and incomplete information about the options available to pregnant adolescents are funded by the Act. The AFLA thus not only violates the

2 Reviewers of grant applications emphasized religious involvement in their evaluations of the strengths and weaknesses of applicants' proposals. They found, for example, that the "biggest weakness" of San Diego University Foundation's application was "no discussion of moral values or spiritual development. . . . No research plan to do . . . 'church attendance' level assessment of previous and post-intervention level of moral and spiritual development on activity rate." Similarly, Baltimore City's application was criticized for "[l]acking . . . the kind of counseling that you get in Catholic Social Services." Another reviewer noted that "[n]o experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." JA at 509-511.

Summaries prepared to explain why applicants were rejected also focused on the absence of religious involvement. Lake Cumberland District Health Department was found lacking because it "promised no involvement of religious groups." R. 155, App. Vol. IA, 505-D. Junior Education of Tomorrow was criticized for not providing "evidence that local churches or pastoral help and training will be used." *Id.* at 505-E. The Family Health Foundation of Alviso, California failed to demonstrate "inclusion of religious/charitable organizations." *Id.* at 505-F.

3 Section 300z-10(a) requires that:

Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral . . . ; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

constitutional rights of pregnant adolescents but has profound negative consequences for adolescent health.

Summary of Argument

This Court has repeatedly recognized that the government may not interfere with the constitutionally protected right to make procreative decisions by dictating the contours of the dialogue between a woman and her health care providers. By requiring the involvement of religious organizations and prohibiting any discussion of abortion, the AFLA manipulates impermissibly the provision of information about prudent approaches to adolescent sexuality and pregnancy, and thus violates this right.

Although one of the stated purposes of the AFLA is to encourage and provide for the dissemination of information about adolescent sexuality and pregnancy, the Act prevents physicians and other health care professionals from providing accurate information about the physical and psychological risks of various procreative options, including abortion. In this respect the AFLA requires deviation from accepted professional standards. In fact, only full discussion of factual information about the entire range of reproductive and contraceptive options permits a constitutional free choice and enhances development of responsible adolescent decision-making about sexuality and childbirth.

By requiring grantees to involve religious organizations in sex education and pregnancy counseling and, at the same time, prohibiting those grantees from communicating information about abortion, the AFLA grants preferences to those religions that teach the impermissibility of abortion. Moreover, the government, having opened a channel for communication about adolescent pregnancy, may not, consistent with the First Amendment, discriminate among the options that may be communicated. No compelling government interest can be offered sufficient to justify the AFLA's favoring either certain religions or certain viewpoints about abortion over others.

I. THE ADOLESCENT FAMILY LIFE ACT IMPERMISIBLY INTERFERES WITH AN ADOLESCENT'S CONSTITUTIONAL RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS.

A. The AFLA Compels Grantees to Provide Distorted Information in Violation of a Woman's Fundamental Constitutional Right to Make an Informed Reproductive Choice Free of Government Coercion.

This Court has held that "the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419 (1983). Moreover, this Court has repeatedly protected women's right to decide by rejecting states' attempts to interfere with a woman's decision-making process. It has taken a particularly harsh view of state efforts to insinuate itself into the decision-making process by controlling the content of the patient-physician relationship.

In *Akron*, for example, the Court struck down an ordinance requiring physicians to furnish pregnant women contemplating abortion with certain specific information, some of which was misleading. The Court held that this requirement was an unconstitutional attempt by the state "to influence the woman's informed choice between abortion and childbirth." 462 U.S. 416, 447. Again, in *Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ___, 106 S.Ct. 2169 (1986), the Court rejected Pennsylvania's attempt to insert itself into the "privacy of the informed-consent dialogue between the woman and her physician" by requiring physicians to convey specified information to their patients. 106 S.Ct. at 2179.

The Court found the *Akron* and Pennsylvania laws constitutionally defective for two reasons. First, they required physicians to convey information that was designed to influence a woman's choice between abortion and childbirth. Second, they placed a "straitjacket" on the informed-consent dialogue be-

tween a woman and her physician.⁴ *Thornburgh*, 106 S.Ct. at 2179 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

The two reasons that this Court articulated for invalidating the laws at issue in *Thornburgh* and *Akron* apply with equal force to the AFLA. First, the Act delivers pregnant adolescents misinformation by requiring doctors or other experts to omit critical facts about abortion alternatives when counseling them on pregnancy; like the information provided in *Akron* and *Thornburgh*, these omissions are obviously designed to deter adolescents from choosing abortion. Second, it "straitjackets" physicians and health care professionals, requiring them to reject accepted medical practice, the guidelines promulgated by their professions, and the health interests of their patients.⁵

⁴ This Court's decisions in *Maher v. Roe* and *Harris v. McRae* do not validate the kind of active state interference with a woman's reproductive choice that the AFLA represents. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). *Maher* and *Harris* stand for the proposition that, while a woman has a right to choose an abortion, she does not have a right to compel the state to pay for the abortion simply because it has chosen to pay for childbirth. Central to these decisions was the fact that the women affected were no less able to exercise their constitutional right under the challenged funding scheme than if the government had provided no benefits at all.

The AFLA, however, does more than passively refuse to subsidize abortions or programs that encourage abortions. It invades the realm of privacy protected by this Court—the *process of deciding* whether to bear a child. By funding programs that provide pregnancy counseling so long as they deliver no information about abortion, the Act requires the transmission of incomplete and misleading information to pregnant women. It thereby precludes them from exercising a knowing and intelligent bearing choice. *Akron* and *Thornburgh* demonstrate that the government's efforts in the AFLA to manipulate a woman's reproductive choice by controlling the content of the patient-physician dialogue are unconstitutional.

⁵ Although most cases concerning abortion counseling deal with licensed physicians, the principles underlying those decisions apply to the consultative programs subsidized by the AFLA. Doctors in hospitals or clinics funded under the Act are subject to its restrictions. Moreover, even when counseling is conducted by non-physicians, the services provided are

1. The AFLA Both Intrudes on the Discretion of Health Professionals and Distorts Information Given to Pregnant Adolescents in Order to Deter Them From Choosing Abortion

The AFLA requires physicians and other health professionals in funded programs to withhold customary and relevant medical information to pregnant adolescents in their care. A governmental proscription on the provision of abortion information intrudes on the discretion of health care providers and interferes with a woman's procreative choice as effectively as a state requirement that certain kinds of information be provided.

One way in which the Act "straitjackets" counselors and misleads adolescents in their care is by forbidding full disclosure of the relative risks and options to an adolescent, who, for health reasons, should avoid childbirth. For example, a pregnancy counselor who is funded under the Act cannot inform an adolescent who suffers from chronic renal disease that she is at increased risk of morbidity and mortality unless she chooses to terminate the pregnancy.⁶ Similarly, adolescents afflicted with cancer, diabetes, heart problems, sickle cell anemia, and hypertension cannot be informed by their physicians that abortion may be medically indicated. JA 527-528.

In addition, an adolescent who tests positive for antibodies to the AIDS virus will not receive the information she needs to make an informed procreative choice. A woman who tests

functionally identical to those provided within a doctor-patient relationship. See *Akron*, 462 U.S. at 448 (recognizing the similarity between abortion counseling by physicians and other qualified professionals and holding that a state may not require that counseling be conducted by physicians). It would be illogical to allow the government to intrude on the dialogue between a woman and her health counselor merely because the woman is being advised by a non-physician.

⁶ See Kreuter & Hollingsworth, *Adolescent Obstetrics and Gynecology* 192-93 (1978).

positive may be more likely to develop AIDS Related Complex ("ARC") or AIDS if she carries a pregnancy to term. Thus, termination of the pregnancy may reduce the risk of AIDS or ARC to the adolescent. Moreover, approximately one-third to one-half of the infants born to AIDS-infected mothers will also be infected with the AIDS virus⁷ and, because there is no known treatment to prevent fetal transmission, abortion is the only way to avoid the heartbreak and trauma of giving birth to an infant with AIDS. Thus, morbidity and mortality may result from the AFLA's prohibition on abortion counseling in such cases.

The AFLA's prohibition on abortion information also hampers the ability of physicians and counselors to provide genetic counseling. Any responsible counseling in the area of genetic diseases, where the condition is detectable prenatally, requires discussion of abortion.⁸ For example, at the time a patient receives health care, tests or her medical history may reveal that she is at increased risk of giving birth to a child with a genetic disability such as Sickle Cell Anemia or Tay Sachs

⁷ United States Department of Health and Human Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 20-21 (1987). The American College of Obstetricians and Gynecologists also states that women with antibodies to the AIDS virus "must" be counseled that if they become pregnant, the pregnancy may precipitate illness and that women infected with the AIDS virus "must understand that the probability is 20-50% that they will transmit infection perinatally to their fetus or newborn. . . . Those who do become pregnant should be counseled again about the risks to themselves and their child and should be informed about the option of pregnancy termination." ACOG Committee on Obstetrics: Maternal and Fetal Medicine and Gynecologic Practice, *Prevention of Human Immune Deficiency Virus Infection and Acquired Immune Deficiency Syndrome*, June 1987.

⁸ See Fletcher, Berg & Tranoy, *Ethical Aspects of Medical Genetics*, 27 Clinical Genetics 199, 201 (1985); and Powledge & Fletcher, *Guidelines For Ethical, Social, and Legal Issues in Prenatal Diagnosis*, 300 New England J. Med. 168, 169 (1979) (the genetic counselor, out of respect for patient autonomy, should provide complete information on various options, including abortion).

disease. She will, of course, want and need to know what options are available to her to make an informed choice for herself between abortion and carrying the pregnancy to term. The AFLA prevents a physician from informing the patient of the availability of amniocentesis to test her fetus for genetic disability, and the option of abortion if the fetus is diagnosed with such a disability. As a result, she too is compelled to make her procreative choice on the basis of misleading information.

The AFLA would also bar full disclosure of the relative risks and options to an adolescent who, for health reasons, wishes to consider alternative forms of contraception. For example, adolescents who have a history of risk factors for thromboembolic disorders should be advised by their physicians that use of oral contraceptives may increase their risk of pulmonary embolism and stroke.⁹ A full discussion of alternatives, including barrier contraceptive methods such as the diaphragm and condom, must include their higher failure rates. The physician would be precluded under the AFLA from accurately responding to questions from the patient on the relative risks of using various methods of birth control with abortion as a back-up if the method of choice fails.¹⁰

The Act likewise prohibits counselors from informing teenagers impregnated during a rape or as a result of parental incest of the option to abort a pregnancy. This prohibition applies even if the counselor believes that carrying a pregnancy

9 See Lavery & Sanfilippo, *Pediatric and Adolescent Obstetrics and Gynecology* 238-39 (1985).

10 In fact, a physician or counselor could not accurately describe mortality risks for various methods for avoiding the birth of a child, since abortion is one of those methods. The physician would be prohibited from communicating the view that use of barrier methods with the back-up of an early abortion is the safest method of contraception. See Tietze, Bongaarts & Schearer, *Mortality Associated with the Control of Fertility*, 8 *Family Planning Perspectives* (1976); The Alan Guttmacher Institute, *Making Choices—Evaluating the Health Risks and Benefits of Birth Control Methods* (1983) [hereinafter *Making Choices*].

to term would be traumatic for the adolescent and cause her lasting psychological damage.¹¹

The Act interferes with pregnant adolescents' constitutional rights by requiring physicians and other health care professionals to deviate from accepted medical and psychological standards. The ethical and professional guidelines of the American Public Health Association, the American Medical Association, the American Psychological Association, and Planned Parenthood Federation of America mandate the accurate and complete communication of treatment alternatives, including information to a pregnant woman about abortion.¹² Health

11 Section 300z-10(a) does allow recipients of funds to make referrals for abortion counseling, but only if the adolescent *and both* parents or the guardian of such adolescent request it. A blanket provision requiring the consent of parent or guardian as a condition for access by a minor to an abortion has been held unconstitutional by this Court. *Akron*, 462 U.S. at 440; *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) [hereinafter *Bellotti II*]. The same principles that prohibit governments from placing an absolute third-party veto in the way of a minor's obtaining an abortion should prohibit government's granting parents an absolute veto on a minor's decision to obtain counseling for an abortion. The practical effect of requiring parental consent for abortion referral is that a mature minor who seeks an abortion may not be able to obtain one. The Act's failure to take a more individualized approach in assessing the competency and maturity of minors violates the constitutional right of privacy held by mature minors. *Bellotti II* at 643-44 and n.23. Section 300z-10 inflicts even greater harm on those minors whose health is endangered by pregnancy. It ensures that these adolescents will never even learn of the option to abort.

12 The APHA has issued guidelines stating:

education about abortion procedures and services should be the responsibility of all health agencies and professionals concerned with the care of women. . . . Individuals contemplating abortion should be encouraged to seek information and counseling from the best available source. Educational literature on abortion should be easily obtained. . . . The medical professional has an obligation to establish referral relationships for the provision of abortion as with any other specialized medical services.

APHA Recommended Program Guide for Abortion Services (Revised 1979), 70 Am. J. Public Health 652, 653 (1980). See also American College of

care providers who fail to adhere to the principles of their professional organizations may risk professional censure.¹³ Moreover, failure by physicians to achieve informed consent through full disclosure of relevant information and options is a form of medical malpractice, subject to state law sanctions governing medical negligence.¹⁴

Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) ("In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy."); American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920, 921 (1979) (all options, including abortion, should be explored with pregnant teenagers); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981) (Resolution that termination of pregnancy be considered a civil right of the pregnant woman"); Planned Parenthood Federation of America, *Medical Standards and Guidelines* (1987); American Medical Association, *Current Opinions of the Judicial Council of the American Medical Association* (1984) (Sections 8.04, 8.07, 8.11); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981).

The APHA guidelines stress that it is essential to provide information about risks and alternatives to a pregnant woman when she seeks health care because failure to do so may delay her in obtaining abortion information and referral. For each week of delay, the risk of complications after a legal abortion increases 20%; the risk of death increases approximately 50%. 70 Am. J. Public Health 654 (1980).

13 Current Opinions of the Judicial Council of the American Medical Association (1984) (physicians may be suspended or expelled from the AMA for violation of ethical standards such as failure to follow informed consent principles).

14 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 16 (1982). Failure to inform potential parents of the risk of genetic disability and the option of abortion is a form of medical malpractice. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979), overruled on other grounds, *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Becker v. Schwartz*,

2. The Distorted Counseling Required by the AFLA Interferes With An Adolescent's Right to Make Reproductive Choices.

The AFLA strikes at the heart of the right announced in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Akron* and *Thornburgh*: the right to be free from unwarranted state interference in the process of deciding, in consultation with experts, whether or not to bear a child. By requiring physicians and health professionals in funded programs to withhold relevant health information from pregnant adolescents, the AFLA misleads adolescents and prevents them from making an informed choice between childbirth and abortion. By disseminating information on the benefits of adoption, while barring access to data on abortion, the AFLA renders an adolescent in an AFLA program less capable of making an independent reproductive choice than she would be if the program did not exist. Thus, the AFLA infringes on the due process right of women to make a free and informed choice between abortion and childbirth.

B. The Government Cannot Demonstrate that the AFLA Serves Any Interest Sufficient To Justify Its Interference With A Fundamental Right.

This Court has held that the state's interest in protecting adolescents from an *uninformed*, immature choice will justify increased regulation of a minor's access to abortion. *Bellotti II*, 443 U.S. at 635 (1979). Not only does the AFLA not serve this interest, it actually undermines it. By censoring informa-

46 N.Y.2d 401, 386 N.E.2d 807 (1978). Adolescents are capable of informed consent—they are, on the average, indistinguishable from adults in their ability to understand and reason about health care alternatives, including whether or not to terminate a pregnancy. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Development 1589 (1982). Melton & Pliner, *Adolescent Abortion in Adolescent Abortion* 18-19 (Melton, ed. 1986).

tion on abortion, even to those teenagers with life-threatening pregnancies, and encouraging childbirth in every instance, the AFLA can hardly be said to protect minors from their immaturity. Rather, by disseminating misinformation, the Act exploits the vulnerability of adolescents.

Nor can the government justify the abortion and adoption provisions of the AFLA on the grounds that they protect physical and psychological health. Such a claim lacks any empirical foundation for three reasons: adolescent childbirth presents more health risks than abortion; the children born to adolescents experience higher rates of physical and psychological problems; and unwanted childbirth limits the career aspirations of adolescents.

In terms of risks to life and health, the abortion procedure is safer than continued pregnancy and childbirth. At eight weeks of gestation or earlier, the risk of death from abortion is about 20 times lower than that of childbirth, and at no point in pregnancy is abortion more dangerous than childbirth.¹⁵ Finally, abortion is rarely followed by significant medical sequelae.¹⁶

Teenage mothers, particularly younger ones, are, however, at particular risk from pregnancy and childbirth.¹⁷ Adolescent

15 See LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Medical Assoc. 188, 191 (1982); Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. Am. Medical Assoc. 192, 195-96 (1982).

16 Contrary to the information about abortion provided by some AFL grantees, JA 350, 425, 589, researchers have demonstrated that abortions cause no negative effects on subsequent pregnancies in the United States. Chung, Smith, Steinhoff and Mi, *Induced Abortion and Spontaneous Fetal Loss in Subsequent Pregnancies*, 72 Am. J. Public Health, 548, 551 (1982), or worldwide, see Hogue, Cates and Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 Epidemiological Reviews 66, 88-89 (1982); see also Tietze & Henshaw, *Induced Abortions: A World Review 1986* at 97-105 (6th ed. 1986) (examining complications and sequelae from induced abortions).

17 National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I 123-25 (1987).

girls experience 2½ times greater risk of death from continued pregnancy or childbirth than adult women, and also much higher rates of major health complications.¹⁸ For example, women younger than age fifteen are 15% more likely to suffer from toxemia, 92% more likely to develop anemia, and 23% more likely to suffer complications from a premature delivery than are women aged twenty to twenty-four.¹⁹

In addition to the physiological risks childbirth may entail, carrying a child to term and then giving it up for adoption can be psychologically damaging for the mother. Four principal studies of women who have surrendered their infants for adoption uniformly conclude that women who relinquish their children for adoption are exposed to serious social and psychological harm.²⁰ Among the problems noted by these research studies are social rejection and ostracism, obsessive fear of future infertility, varying degrees of sexual dysfunction and marital problems.

In contrast, abortion has far fewer negative psychological consequences. Studies show that one of the most frequent emotional responses to the abortion procedure is relief.²¹

18 See Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 29 (1981) [hereinafter *Teenage Pregnancy*]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Medicine 621, 622 (1983).

19 *Teenage Pregnancy* at 29.

20 See Burnell and Norfleet, *Women Who Placed Their Infant for Adoption: A Pilot Study*, 1 Patient Counseling Health Education 169 (1979); Rynearso, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139 Am. J. Psychiatry 338 (1982); Deykin, Campbell and Patti, *The Post-Adoption Experience of Surrendering Parents*, 54 Am. J. Orthopsychiatry 271 (1984); Winkler & Van Keppel, *Relinquishing Mothers in Adoption*, 3 Institute of Family Studies Monograph 1-2 (1984).

21 See Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsychiatry 503, 504 (1977); National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* at 195; Adler & Dolcini, *Psychological Issues and Abortion for Adolescents*, in *Adolescent Abortion: Psychological & Legal Issues* 84 (Melton, ed. 1986) (Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association) [hereinafter *APA Report*].

Severe psychological after-effects rarely occur, and other sequelae, such as regret, depression or guilt, "are mild and diminish rapidly over time and general functioning is not adversely affected," Adler and Dolcini, *APA Report* at 84. In addition, adverse psychological after-effects such as depression are more common for childbirth than for abortion.²²

The children of teenage mothers are also adversely affected. They are twice as likely to die in infancy as the children of women in their twenties and they are more likely to be premature or of low birth weight.²³ Low birth weight is itself a major cause of infant mortality, serious illness, birth injury, mental retardation, and other neurological defects.²⁴ The children of teenage mothers also suffer educational disadvantage, tend to have lower IQ and achievement scores, and are more likely to repeat at least one grade.²⁵

In addition, studies show that children born to teenage mothers who have been denied permission to abort manifest

22 See Cates, *Adolescent Abortions in the United States*, 1 *Journal Adolescent Health Care* 18, 22 (1980); Maracek, *Consequences of Adolescent Childbearing and Abortion*, in *APA Report* at 110-12 (showing that severe emotional consequences rarely, if ever, occur after abortion and that there is evidence that suggests positive changes occur in some cases); Koenig & Zelnik, *Repeat Pregnancies Among Metropolitan-Area Teenagers: 1971-1979*, 14 *Family Planning Perspectives* 341 (1982) (Unmarried teenagers whose first pregnancy ended in abortion were only half as likely to become pregnant a second time within 24 months as those unmarried teenagers whose first pregnancy resulted in a live birth).

23 See *Teenage Pregnancy* at 29. Pregnant adolescents are less likely to receive prenatal care than older women. Even when they receive care, however, their infants are at increased risk of adverse outcomes. Leppert, Namerow & Barker, *Pregnancy Outcomes Among Adolescent and Older Women Receiving Comprehensive Prenatal Care*, 7 *J. Adolescent Health Care* 112 (1986).

24 See *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 *Family Planning Perspective*, 91-92 (1984).

25 See Baldwin and Cane, *The Children of Teenage Parents*, 12 *Family Planning Perspectives* 34, 37 (1980).

particular problems in adjustment, mental and physical capacity, and in the mother-child relationship.²⁶

Nor can the government justify the AFLA's prohibition on abortion counseling on the grounds that it promotes the social welfare of minors. It is widely recognized that an ill-informed decision on childbirth may have drastic adverse economic and social consequences for pregnant teenagers, particularly those low-income youths who are targeted by the Act. The Findings of the AFLA itself take note of the adverse effects of childbirth for teenagers. 42 U.S.C. § 300z(a)(5). For example, mothers who give birth before age eighteen are only half as likely to graduate from high school as those who postpone childbearing until after age twenty and they are four to five times less likely to finish college.²⁷ Families headed by teenage mothers are seven times more likely than others to be poor, and the younger the mother, the lower the family income.²⁸

The distorted counseling mandated by the Act is particularly harmful for low-income teenagers and their parents because they are least likely to be fully informed of the options available to pregnant teenagers and to have access to alternative, unbiased, comprehensive health-care programs. Given the

26 David and Matejcek, *Children Born to Women Denied Abortion: An Update*, 13 *Family Planning Perspectives*, 32, 33 (1981); Caplan, *The Disturbance of the Mother-Child Relationship by Unsuccessful Attempts at Abortion*, 38 *Mental Hygiene* 67, 77 (1954); Hook, *Refused Abortion: A Follow-up Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden*, 42 *Acta Psychiatrica Scandinavica* 71-88 (1966).

27 See Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 *Family Planning Perspectives* 199, 203-04 (1978); see also Moore & Waite, *Early Childbearing and Educational Attainment*, 9 *Family Planning Perspectives*, 220, 222-23 (1977); Mott & Marsiglio, *Early Childbearing and Completion of High School* 17 *Family Planning Perspectives* 234, 235-36 (1985).

28 See *Teenage Pregnancy* at 33. Marecek, *APA Report* at 98-108 (long term effects of carrying to term can include negative impact on educational and occupational attainment, economic status, marital experiences, and subsequent childbearing).

plethora of harms associated with compelling a teenager to carry a pregnancy to term, the government can assert no interest that justifies its invasion of an adolescent's right to decide whether or not to terminate her pregnancy.

II. THE AFLA DISCRIMINATES AMONG RELIGIONS BY REQUIRING THE INVOLVEMENT OF RELIGIOUS ORGANIZATIONS THAT DO NOT ADVOCATE, PROMOTE OR ENCOURAGE ABORTION.

A. Because the AFLA Favors Certain Denominations It Must Be Subject to Strict Scrutiny.

Religious denominations in the United States are sharply divided over the question of abortion. JA 601-605. The Roman Catholic Church teaches that personhood begins at the moment of conception and, therefore, from its perspective, abortion is murder. JA 591. Judaism and most mainline Protestant groups reject the notion of fetus as person on religious grounds. JA 592. Under Jewish law, for example, abortion is an option that may be religiously compelled where the mental or physical health of the pregnant woman is threatened. JA 600. Other religious denominations teach that the requisite moral choices involve consideration of factual information about the consequences of alternative courses of action to oneself, one's family, and society. Accordingly, many Protestant denominations, such as the Methodists, hold that the abortion decision must be a matter of conscience for the woman, requiring consideration of available options. JA 602, 606. Other denominations, such as the General Assembly of the Presbyterian Church, support the availability of abortion. The Southern Baptist Convention has officially sanctioned teaching materials discussing abortion. JA 597.

This plurality of religious views on the morality of abortion is protected by the First Amendment's provisions regarding the establishment and free exercise of religion. Nevertheless, Congress has attempted to establish some religions in passing a statute that mandates the involvement of religious organiza-

tions in the presentation of information on adolescent sexuality and pregnancy and simultaneously prohibits presentation of information about abortion. Under the AFLA an abortion "test" is applied to religious applicants and also to religious organizations that are involved in the projects administered by other organizations. Only religious organizations which do not "advocate, promote or encourage" abortion may be funded under the AFLA or involved in programs administered by other grantees.

The inevitable consequence of the conjunction of the abortion prohibition with the involvement of religious organizations is the favoring of some religions over others. Numerous religions are subject to impermissible discrimination. For example, Southern Baptist Churches providing sex education with the officially sanctioned text of the Southern Baptist Convention, *Growing Up With Sex*, are ineligible for AFLA funding because the book presents information on pregnancy options, including abortion. Even though *Growing Up With Sex* advocates premarital sexual abstinence, provides factual information on sexual maturation, and supports the development of responsible sexual attitudes, its provision of abortion information disqualifies Southern Baptist Churches using it from AFLA funding. JA 597.²⁹

In contrast, groups with anti-abortion religious beliefs are benefitted by the AFLA. Family of the Americas Foundation (FAF), for example, received \$1,239,250 to provide prevention programs. JA 791. These programs relied on unsound contraceptive methods, taught that abortion was the "premeditated killing of an unborn baby in the mother's womb," and pre-

29 Other religious leaders perceive their denominational beliefs denigrated by the government's exclusive funding of religious organizations that hold religious views on the issue of abortion antithetical to their denomination's views. See testimony of Reverend Vaughan, Methodist minister of Beverly Hills Church, JA 54; Reverend Buxton, Minister of Floris Methodist Church, JA 56; Rabbi Luxenburg, member and representative for the American Jewish Congress, JA 58-61.

sented only negative and biased information about abortion. JA 587.³⁰

Similarly, St. Margaret's Hospital, a Catholic hospital run by the Archdiocese of Boston, received \$1,879,118 for Combination Care and Prevention projects. At St. Margaret's adolescents were taught biased and misleading information on family planning and abortion designed to discourage the use of contraceptives and abortion in accordance with Catholic doctrine and in opposition to the health needs of its adolescent patients. JA 525-539.

When the Court is presented with an establishment clause challenge to a law "granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246 (1982).³¹ Strict scrutiny applies

30 FAF describes itself as "a Christian Alternative" and its Executive Director reports regularly to the head of the Catholic Church. JA 381, 581, 627, 629. It teaches the ineffective Billings Ovulation method of family planning to those who are striving "to make themselves better instruments of God's plan." FAF encourages the Billings method because "it helps realize that the family is an integral part of the church." JA 379, 385. The Billings method relies on self-detection of changes in cervical mucus throughout the menstrual cycle, permitting abstinence during fertile periods. The Billings method has a high failure rate of approximately 24% for all users. Alan Guttmacher Institute, *Making Choices* at 8, 28. It is particularly unsuited for adolescents and the many women who have irregular or anovulatory periods. *Id.* at 8. FAF also taught adolescents that condoms are "a pollution of their own bodies," JA 381, and that they were "messy, unnatural," caused "irritations," and were "never" recommended. JA 396. Consequently, FAF education blunts, for religious reasons, the impact of the Attorney General's recommendation that use of condoms can provide protection from AIDS. *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 17 (1987). These are examples of how AFLA promotion of religious dogma on abortion has led to government support of religiously-motivated misinformation on family planning and sexually transmitted disease prophylaxis.

31 Statutes, to be upheld under the establishment clause, must in addition to not discriminating among religions, pass the three-part test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, a government action survives establishment clause scrutiny only if it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits

whether or not discrimination appears on the face of the statute. *Gillette v. United States*, 401 U.S. 437, 452 (1971).³² In *Larson v. Valente*, for example, the Court subjected to strict scrutiny a Minnesota statute that required reports only from religious organizations that received most of their contributions from nonmembers even though the statute did not express a denominational preference on its face. Like the statute found unconstitutional in *Larson*, the AFLA makes "explicit and deliberate distinctions between different religious organizations." 456 U.S. at 247 n.23. It effectively distinguishes between denominations which espouse an absolute prohibition on abortion as a part of their religious dogma on the one hand and denominations which espouse a broader view of moral options available to pregnant adolescents on the other hand.

B. The AFLA Is Not Narrowly Tailored to Further a Compelling Government Interest.

Even if government interests in preventing the adverse health, social, and economic consequences of adolescent pregnancy and childbirth were sufficiently compelling to justify discrimination among religions, the AFLA does not in any way promote those interests. The inclusion of religious denominations that do not advocate, promote or encourage abortion

religion, and (3) does not foster excessive government entanglement with religion. As appellees argue, and as the District Court found below, the AFLA also fails the effect and entanglement aspects of the *Lemon* test.

32 The AFLA cannot escape strict scrutiny under *Gillette* because it applies to organizations and not to individuals. *Gillette* involved an Establishment Clause challenge to a statute that accorded conscientious objector status to individuals who, like Quakers, conscientiously oppose all wars but not to individuals who, like Catholics, oppose only unjust wars. There the statute applied equally to individuals, and did not treat religions or religious organizations differently. In contrast, the AFLA explicitly requires applicants to involve *religious organizations*. Accordingly, the government must distinguish between the moral principles and theological positions of various sectarian organizations.

simply does not further the interests that the AFLA purportedly serves.

For the reasons documented in Point I, *supra*, the AFLA's prohibition on abortion counseling and referral has a devastating effect on the health and well-being of the vulnerable and underserved adolescents targeted by the Act. Denial of the constitutional right to make informed reproductive decisions with a concomitant rise in the risk of adolescent morbidity and mortality is a consequence of the Act. Furthermore, adolescents may be likely to reject the health information proffered.

One of the dangers of government endorsement or disapproval of religion is the creation of an outsider class:

Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). See also *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). To the extent that government support of religious organizations that are opposed to abortion discourages other charitable groups and nonreligious adolescents from participating in reproductive health and education programs, the AFLA is counterproductive. By making certain religious organizations and adolescents feel like outsiders, the AFLA has increased the chance that opportunities to participate in valuable health programs will be rejected.

Public health research on the effectiveness of various approaches to the problems of adolescent pregnancy has not demonstrated benefit to programs administered by religious organizations or involving religions that have strictures against abortion and contraception. Given the overwhelming problems of teenage pregnancy, a statute that discriminates against religious organizations who offer unbiased information on reproductive options is not closely tailored to further any compelling government interest and must be invalidated.

III. THE AFLA'S RESTRICTION ON ADVOCATING, PROMOTING OR ENCOURAGING ABORTION DISCRIMINATES ON THE BASIS OF VIEWPOINT IN VIOLATION OF THE FIRST AMENDMENT.

Once the government has opened a forum for discussion, it must maintain viewpoint neutrality and ensure that the forum be nondiscriminatory. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985).³³ In *Cornelius*, the Court upheld an Executive Order banning access by legal defense and political advocacy organizations to a non-public forum only because the ban was viewpoint neutral. The Court noted, however, that even a facially neutral regulation would fall if it were "in reality a facade for viewpoint-based discrimination." 473 U.S. at 811. Thus, if a facially neutral regulation can be unconstitutional, the explicitly discriminatory prohibition on abortion information in the Act is clearly unconstitutional.

Moreover, principles of viewpoint neutrality dictate that public funds may not be allocated so as to suppress "dangerous" ideas while subsidizing "approved" ideas. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). There, the Court struck down a ban on editorializing by publicly-funded radio stations

³³ It is irrelevant that the forum here is not the traditional one of public streets, sidewalks and parks. This Court has held in *Cornelius* that:

In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for the use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.

473 U.S. at 802 (emphasis added). Here the government has expressly created a public forum encouraging public communication, especially between parents and adolescents, and among the schools, youth agencies, charitable organizations, and health providers who serve them. An announced purpose of the AFLA is to:

"encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood."

42 U.S.C. § 300z(b)(6). Consequently the government has opened a channel for public communication under the AFLA.

on First Amendment grounds because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." *Id.* at 383-84, quoting *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). See also *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (restriction prohibiting receipt of tax-deductible contributions by non-profit lobbying organizations upheld only because of its viewpoint neutrality); *Arkansas Writers' Project, Inc. v. Rugland*, ___ U.S. ___, 107 S. Ct. 1722 (1987) (public regulation of publications on the basis of their content violates the First Amendment).³⁴

Here, the AFLA requires the Secretary of Health and Human Services to ascertain whether programs conform with the limitation on providing abortion information and to withhold their funds if they do not. 42 U.S.C. § 300z-10(b). By such punitive measures the statute compels what the First Amendment forbids by granting government the power to restrict expression "because of its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

The government need not remove those obstacles not of its own creation in the way of a person's right to free speech. However, having opened a channel for speech about adolescent sexuality and pregnancy, it may not block the dissemination of medical information about abortion. See *Regan v. Taxation With Representation*, 461 U.S. at 549-50. No compelling government interest can be offered in support of a prohibition that distorts the medical information available to adolescents to the detriment of their health and well-being.

³⁴ More than a decade ago the Supreme Court held that a statute prohibiting anyone to "encourage or prompt the procuring of abortion . . ." violated the First Amendment, even as applied to commercial advertising. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Later, counseling about abortion was held to be constitutionally protected speech. See, e.g., *Planned Parenthood Association v. Kempiners*, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983). *Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd without opinion sub nom.*, *Planned Parenthood v. Babbitt*, 107 S. Ct. 391 (1986), is inapposite in a First Amendment context. There the court, relying on *Maher v. Roe*, 432 U.S. 464 (1977), which had been decided on Fourteenth Amendment equal protection grounds, permitted Arizona to refuse to fund abortion-related activities by non-governmental organizations. *Maher* has no application in the First Amendment area. 432 U.S. at 475 n.8. Here the government has forbidden grantees to freely express their views on abortion, even if grantees use their own funds to do so. JA 93. Thus the government has impermissibly conditioned the receipt of a government benefit on the sacrifice of the constitutional right to free expression. *Sherbert v. Verner*, 374 U.S. 398 (1963).

Conclusion

Amici urge that the District Court's judgment be affirmed as to its finding that the AFLA is unconstitutional insofar as it involves religious organizations and reversed as to its upholding the constitutionality of the Act as it applies to all other applicants and grantees.

Dated: New York, New York
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.
(and three consolidated cases)

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF *AMICUS CURIAE* OF THE
**NATIONAL COALITION FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY (NATIONAL PEARL)¹**
PEOPLE FOR THE AMERICAN WAY
ADVOCATES FOR CHILDREN OF NEW YORK, INC.
ASSOCIATION FOR SUPERVISION AND
CURRICULUM DEVELOPMENT
NATIONAL ASSOCIATION OF
ELEMENTARY SCHOOL PRINCIPALS
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in this Brief:**

American Ethical Union
American Humanist Association
Americans for Religious Liberty
Board of Church and Society of the United
Methodist Church
Central Conference of American Rabbis
Committee for Public Education and Religious
Liberty
Council for Democratic and Secular Humanism
MC PEARL—Monroe County, New York PEARL
Michigan Council About Parochial Aid
Missouri Baptist Christian Life Commission
Missouri PEARL
Nassau-Suffolk PEARL
National Association of Catholic Laity
National Council of Jewish Women
National Education Association
National Service Conference of the American
Ethical Union
New York State United Teachers
Ohio Association for Public Education and Religious
Liberty
People for the American Way
Public Funds for Public Schools of New Jersey
Union of American Hebrew Congregations
Unitarian Universalist Association

QUESTION PRESENTED

Does the Establishment Clause permit the Government to pay religious organizations to promote government policies that such organizations teach as articles of religious faith?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

Nos. 87-253, 87-431, 87-462 & 87-775

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.
(and three consolidated cases)

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF AMICUS CURIAE OF THE
NATIONAL COALITION FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY (NATIONAL PEARL)
PEOPLE FOR THE AMERICAN WAY
ADVOCATES FOR CHILDREN OF NEW YORK, INC.
ASSOCIATION FOR SUPERVISION AND
CURRICULUM DEVELOPMENT
NATIONAL ASSOCIATION OF
ELEMENTARY SCHOOL PRINCIPALS
NATIONAL CONGRESS OF PARENTS AND TEACHERS
SEX INFORMATION AND EDUCATION
COUNCIL OF THE U.S.
SOCIETY FOR THE SCIENTIFIC STUDY OF SEX
VERN L. BULLOUGH
SUPPORTING APPELLEES

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

Section 2006 of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z-5(a):

"An application for a grant for a demonstration project for services under this subchapter . . . shall include—

....
(21) a description of how the applicant will, as appropriate in the provision of services—

....
(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector"

INTEREST OF AMICI CURIAE

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the common objectives of preserving freedom and the separation of church and state in public education. National PEARL includes, among other organizations, the Committee for Public Education and Religious Liberty, which joins this Brief on behalf of its member organizations, some of which are also members of National PEARL.¹

¹ The members of the Committee for Public Education and Religious Liberty include: American Ethical Union; N.Y. Americans for Democratic Action; Americans for Religious Liberty; Aspira; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Community Church of New York; Council of Churches of the City of New York; Council of Supervisors and Administrators; Episcopal Diocese of Long Island, Committee on Social Concerns and Peace; Humanist Society of Greater New York; Jewish War Veterans, New York Department; National Service Conference of The American Ethical Union; New York Federation of Reform

People For the American Way is a non-partisan citizen's organization established to promote and protect civil and constitutional rights. People For the American Way was founded in 1980 by a group of religious, civic, and education leaders devoted to our heritage of tolerance and pluralism; it now has 270,000 members nationwide. The organization's primary mission is to educate the public on the importance of our democratic tradition and to defend that tradition against attacks by those who would impose sectarian constraints on a free society.

Advocates for Children of New York, Inc. (AFC) is a 17-year-old voluntary, non-profit children's rights organization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in the courts and the legislature, and through public advocacy activities. AFC joins this Brief because of its interest in promoting full discussion of information and ideas in educational settings.

The Association for Supervision and Curriculum Development is a 76,000-member association of principals, teachers, central office administrators, and professors who care deeply about assuring a quality education for all students. As practicing educators, the Association's members and their students are directly and adversely affected by decisions that limit access to complete and accurate information.

Synagogues; New York Jewish Labor Committee; New York Conference of the Society for Ethical Culture; New York Society for Ethical Culture; New York State Congress of Parents and Teachers; Public Education Association; Union of American Hebrew Congregations; New York State Council; United Americans for Public Schools; United Community Centers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; Workmen's Circle, New York Division; Monroe Citizens for Public Education and Religious Liberty; and New York State United Teachers.

Vern L. Bullough is Dean of Natural and Social Sciences of the State University of New York at Buffalo. He has extensively researched and written on church-state conflicts over human sexuality. He joins this Brief out of concern that the challenged statute improperly permits religiously inspired restrictions on the complete and objective information on sexuality that should be available to adolescents.

The National Association of Elementary School Principals is a professional organization of more than 23,000 elementary and middle school administrators. Its members are responsible for the education of approximately 25 million elementary school students throughout the country.

The National Congress of Parents and Teachers (National PTA) is a nationwide organization with a current membership of over 5.8 million parents, teachers, and concerned citizens. The primary purpose of the National PTA is to promote the welfare of children at home, in school, and in the community.

The Sex Information and Education Council of the U.S. (SIECUS) is a private, non-profit, educational organization established to promote healthy sexuality as an integral part of human life. It believes that accurate information, comprehensive education, and positive attitudes toward sexuality enhance individual physical and mental health and promote communication and caring within our society. SIECUS provides information and education on sexual matters through a clearinghouse and resource center.

The Society for the Scientific Study of Sex is an international organization dedicated to the advancement of knowledge about sexuality. The Society brings together an interdisciplinary group of professionals who believe in the importance of both the production of quality research and clinical, educational, and social applications of research related to all aspects of sexuality.

INTRODUCTION

At issue in this case is the constitutionality of the Adolescent Family Life Act (AFLA), a federal statute that provides public funds to religious organizations, among other groups, for care, education, and counseling services aimed at preventing adolescent premarital sexual relations and pregnancy. Plaintiffs—federal taxpayers, clergy members, and the American Jewish Congress—filed suit in the U.S. District Court for the District of Columbia, alleging that AFLA on its face and as applied violated the Establishment Clause. The District Court held AFLA unconstitutional insofar as it involved religious organizations in the provision of services. The District Court subsequently held that the statute's references to religious organizations were severable from the rest of the statute. The case is before this Court on appeals by the Government and intervenor-defendant United Families of America from the District Court's ruling that AFLA violates the Establishment Clause, and on plaintiffs' cross-appeal from the ruling on severability.

STATEMENT OF THE CASE

1. Congress enacted AFLA, 42 U.S.C. §§ 300z to 300z-10 (1982), to replace the Health Services and Centers Amendments of 1978 (Title VI).² AFLA's sponsors, Senators Jeremiah Denton and Orrin Hatch, maintained that Title VI was inadequate to combat adolescent premarital sex and pregnancy. They asserted that Title VI did not sufficiently involve private entities, including religious organizations, in the provision of services and that it did not adequately emphasize the value of abstinence from premarital sex, or promote adoption as an alternative to abortion.³

² Pub. L. No. 95-626, tit. VI, 92 Stat. 3595 (repealed October 1, 1981).

³ See S. Rep. No. 161, 97th Cong., 1st Sess. 4 (1981); 127 Cong. Rec. 8266 (1981) (remarks of Sen. Hatch); Letter to President Reagan from Sens. Hatch, Denton, East, and Nickles (Aug. 1981).

AFLA met these perceived deficiencies in Title VI. First—and central to this case—AFLA included a requirement that applicants for funds describe how they would.

"as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . ."

42 U.S.C. § 300z-5(a)(21). Second, AFLA authorized grants not only to provide care services for pregnant adolescents, but also to provide services necessary to prevent adolescent pregnancy. *Id.* § 300z-1(a)(8). These "prevention services" were to emphasize sexual abstinence rather than contraception as the means to prevent pregnancy. *See id.* § 300z-1 (a)(4)(G); *id.* § 300z-3(b). Finally, AFLA barred grantees from using AFLA funds to promote or encourage abortion or to provide abortion referrals—unless requested by both the adolescent and his or her parents. *Id.* § 300z-10. Grantees were directed to encourage adoption in lieu of abortion. *Id.* § 300z-1 (a)(4)(B); *see also id.* § 300z(b)(2).

2. Plaintiffs challenged AFLA not only on its face but also as applied. Evidence concerning AFLA's application centered on the Office of Adolescent Pregnancy Program (OAPP), the agency within the U.S. Department of Health and Human Services (HHS) responsible for administering AFLA.

The Director of OAPP selected 72 "external field readers" to review and rank applications. Joint Appendix ("J.A.") at 95. Twenty-nine of these readers either were employed by religious organizations or had close ties with such organizations.⁴ Many readers indicated by

(attached as Exhibit A to Plaintiffs' Memorandum in Response to District Court's Order of April 15, 1987 In Opposition to Severance).

⁴ R. 155, Vol. 1, at 29-34; *see also J.A.* at 98.

written comments on application scoring sheets that they favored programs contemplating an overtly religious approach to counseling adolescents, and disfavored proposals *lacking* a religious (or an affirmatively anti-abortion) approach. For example, one reader criticized an application as follows: "There is missing a decided pro-life commitment in this proposal . . . Lacking is the kind of counseling that you get in Catholic Social Service, for example." *J.A.* at 509. Another reader criticized a proposal for containing "[n]o experts on transcendental (the most effective) Judeo-Christian values." *J.A.* at 511.

The record further established that awards were approved for programs that employed explicitly religious curricula. For example, one grantee, St. Ann's Infant and Maternity Home, made available to program participants a book that discusses contraception and abortion in these terms:

"For the believer, contraception represents the mentality of those who under pressure of their own sexual desires, or the sexual desires of partners they would rather please than lose, have blocked out the demands of faith in God, who gave man the intelligence and willpower to control his sexuality and regulate his family naturally, lovingly. For the unbeliever, contraception represents the mentality of those who have lost faith in man's ability or willingness to control himself, to love.

....

No one has a right to have sex when there is no mutual intention to cherish, safeguard, protect and provide for the life that may be conceived. Abortion merely compounds the evil by adding the willful termination of an innocent life to irresponsible sexual intercourse."

J. McGaughy, Sex, Love and the Believing Girl (*J.A.* at 336, 357, 360-61).

Religious views on sexuality also were presented in other AFLA-funded programs.⁵ Some AFLA programs conducted by religious grantees took place in conjunction with programs of religious instruction.⁶ The Government acknowledges that some AFLA programs included religious instruction and that other "departures from proper constitutional principles" took place. U.S. Brief at 40.

Grantees and subgrantees included at least ten religious organizations that submitted statements of purpose or articles of incorporation dedicating them to promoting the tenets of their religion.⁷ While some of these organizations' AFLA-funded programs were conducted in such secular settings as public schools,⁸ others were conducted on religious sites adorned with religious symbols, including parochial schools, churches, and parish halls.⁹ They were often publicized to, and conducted for the exclusive benefit of, members of a single denomination.¹⁰

Until 1984, OAPP made almost no attempt to discourage the use of AFLA funds by sectarian organizations to teach religion. After this lawsuit was filed in late

⁵ See, e.g., J.A. at 289-76 (Catholic Charities of Arlington); J.A. at 410-30 (St. Margaret's Hospital); J.A. at 539-60 (Catholic Family Service of Amarillo).

⁶ See, e.g., J.A. at 172-74, 206-09, 225-26, 253-54 (Catholic Charities of Arlington); J.A. at 568 (Northwest Regional Health Center).

⁷ See, e.g., J.A. at 153 (Catholic Family Service of Amarillo); J.A. at 376 (St. Ann's); J.A. at 385-90 (Families of America Foundation); J.A. at 572 (Cities in Schools); J.A. at 515-16 (St. Margaret's Hospital); J.A. at 562 (SEMO); see also J.A. at 608 (Boston Archdiocese).

⁸ See, e.g., J.A. at 401-29 (St. Margaret's Hospital).

⁹ See, e.g., J.A. at 153 (Catholic Family Service of Amarillo); J.A. at 170, 211 (Catholic Charities of Arlington); J.A. at 456 (CASE); J.A. at 491-29 (St. Margaret's Hospital); J.A. at 485 (Lyon County).

¹⁰ See, e.g., J.A. at 264 (Catholic Charities of Arlington); J.A. at 463 (St. Margaret's Hospital).

1983, OAPP wrote letters to three grantees advising them not to use AFLA funds for religious instruction and terminated one grantee for such uses. See J.A. at 671-76, 742-43. In 1984, HHS added to its Notice of Grant Award form a provision advising grantees not to use AFLA funds for religious purposes. J.A. at 514, 757-68. The government did not advise AFLA-funded religious organizations how they might disentangle their religious views from the public policies they were being paid to promote.

3. Plaintiffs filed suit in October 1983. They sought to enjoin funding under AFLA and to obtain a declaration that on its face and as applied AFLA violated the Establishment Clause.

Applying the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the District Court held AFLA invalid "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1570 (D.D.C. 1987). The court concluded that the statute had a valid secular purpose. *Id.* at 1558-60. But the court ruled that on its face and as applied AFLA had the primary effect of advancing religion. *Id.* at 1562-67. The court also determined that AFLA fostered excessive entanglement between the government and religion. *Id.* at 1567-69.

SUMMARY OF ARGUMENT

AFLA impermissibly directs that public funds be awarded to religious organizations to promote government policies that these grantees teach as articles of religious faith. Such direct promotion of religious dogma by government—paying religious entities to propagate religious doctrine—violates the Establishment Clause.

AFLA does not even purport to prohibit grantees from using public funds to promote religious teachings. Such

a prohibition in any event would pose insurmountable entanglement problems. Government officials would be required to assure that counseling by religious entities in matters of ultimate religious concern remained wholly secular.

The Government's attack on the judgment below amounts to a formalistic critique of a District Court's analytical protocol. The Government does not ultimately expose any flaw in the substance of the court's conclusion, nor could it. The substance of that conclusion—that AFLA funds can be and have been used for religious instruction—is clearly supported by the terms of the statute and overwhelming record evidence.

ARGUMENT

I. AFLA IMPERMISSIBLY ADVANCES RELIGION

This Court observed in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), that a law may impermissibly advance religion in three ways. *First*, a law may take a form that renders it readily susceptible to use for religious activities.¹¹ *Second*, a law may provide an "indirect subsidy" to religion when it funds activities that are closely related to the religious mission of "pervasively sectarian" recipients. *See id.* at 392-97, 394 n.12. *Third*, a law may afford a symbolic benefit to religion when it gives rise to an appearance of joint action by governmental and religious authorities. *Id.* at 389-92. *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

¹¹ In *Grand Rapids*, the Court struck down state aid for educational programs in parochial schools because, among other reasons, "teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U.S. at 385. *See also Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

The District Court correctly found AFLA deficient in each of these respects.¹²

A. AFLA Permits Government Funds To Be Used To Teach Religion

Establishment Clause jurisprudence is characterized by "few absolutes," but it *does* absolutely prohibit government-financed "indoctrination into the beliefs of a particular religious faith." *Grand Rapids*, 473 U.S. at 385. Accordingly, this Court has consistently struck down aid to religious organizations that is susceptible to use for religious instruction.¹³ It has concluded, in particular, that financial subsidies for education and counseling of youth are inherently susceptible of such uses.¹⁴ No means,

¹² Although the Court need not address the issue of AFLA's purpose to affirm the District Court's judgment, the Amici joining in this Brief believe that the District Court should have found that AFLA was enacted for the impermissible purpose of advancing religion, for the reasons set forth in the brief *amicus curiae* of the Committee for Public Education and Religious Liberty.

¹³ See, e.g., *Grand Rapids*, 473 U.S. at 385-89; *Wolman v. Walter*, 433 U.S. 229, 248-55 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-72 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-94 (1973); *Sloan v. Lemon*, 413 U.S. 825, 828-31 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-82 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). *See also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding reimbursement to religious schools for costs of state-required testing while noting that "under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services").

¹⁴ See, e.g., *Wolman*, 433 U.S. at 250 (loan of instructional equipment and material to religious schools "inevitably flows in part in support of the religious role of the schools") (emphasis added); *Meek*, 421 U.S. at 366 (aid to educational function of religious schools "necessarily results in aid to the sectarian school enterprise as a whole") (emphasis added); *Nyquist*, 413 U.S. at 774 (finding it impossible to restrict state aid for maintenance and repair of

however carefully crafted, can provide the guarantee required by the Establishment Clause that aid in this form will be used *solely* for secular purposes. *See Meek*, 421 U.S. at 366; *Nyquist*, 413 U.S. at 779; *Lemon*, 403 U.S. at 617.

Under this case law, AFLA is invalid on its face. It is undisputed that, by mandating that applicants "involve" religious organizations in carrying out its program, AFLA contemplates that those organizations will receive federal funds. 42 U.S.C. § 300z-5(a)(21)(B); *Kendrick*, 657 F. Supp. at 1562. Furthermore, AFLA requires grantees to promote chastity and adoption as an alternative to abortion—without even purporting to assure that those policies will not be taught as, or confused with, religious precepts.

Religious grantees are bound to use AFLA aid to further religious teaching. Premarital sexual abstinence and abortion touch matters at the core of religious doctrine.¹⁵ Moreover, they provoke "continuing debate" among religious denominations.¹⁶ As the District Court noted, "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic." 657 F. Supp. at 1563.

religious schools to secular purposes); *Lemon*, 403 U.S. at 617; *cf. Levitt*, 413 U.S. at 480 ("no means are available" to ensure that funding for internally prepared tests at religious schools "are free of religious instruction").

¹⁵ See J.A. at 590-602 (affidavits of experts in theology).

¹⁶ See *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970) (separate opinion of Harlan, J.) (recognizing that birth control and abortion laws are issues of "continuing debate" among religious denominations); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 99 (1980) (separate opinion of Powell, J.) (views favoring abortion would be "morally repugnant" to "church-operated enterprises").

The Government argues that "[o]utside the context of a pervasively sectarian institution, there is no authority in this Court's cases for presuming that religiously affiliated organizations will deliver otherwise secular services in a manner that makes them specifically religious." U.S. Brief at 38. This is incorrect. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court applied just such a presumption in striking down a 20-year limit on the "secular purposes" restriction on federal construction grants to religious colleges and universities:

"Limiting the prohibition for religious use of the structure[s] to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. To this extent the Act therefore trespasses on the Religion Clauses." *Id.* at 683.

The Court applied this presumption even though it determined that the religious colleges and universities receiving the grants were not "pervasively sectarian." *Id.* at 680-82. Aid to non-"pervasively sectarian" organizations may be permissible when the use of such aid is restricted to secular activities. However, when the use of such aid is not so restricted, it is proper to presume that the aid will be used to advance religion. Cf. *Roeper v. Maryland Public Works Board*, 426 U.S. 736, 746-48 (1976).

Moreover, the Government's assertion that it cannot be presumed that AFLA funds will be used to teach religion is sheer fantasy in the context of aid to promote values at the core of religious doctrine. Grants to promote these values surely present a greater potential for inculcation of religious views than does aid for "remedial arithmetic" or "medieval history." Cf. *Meek*, 421 U.S. at 371. And in fact these grants have been used to teach religion, as the Government admits (U.S. Brief at 40-41) and the District Court found (657 F. Supp. at 1567). The Gov-

ernment lamely attempts to dismiss the numerous instances of such religious uses as "not representative." U.S. Brief at 41. But this excuse presupposes a rule so indefensible that it cannot forthrightly be declared—that "minor encroachments" on the Establishment Clause need not trouble this Court. See *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

Because AFLA by its terms allows religious grantees to use grants of public funds to teach religion, and because AFLA grants have been so used, the statute violates the Establishment Clause on its face and as applied.

R. AFLA Funds Sectarian Organizations To Promote Values at the Core of Their Religious Dogma and at the Center of Religious Debate

Aid to religious organizations that is not used for explicitly religious instruction nonetheless advances religion when it supports activities that "go[] hand in hand" with the religious mission of "pervasively sectarian" recipients. See *Grand Rapids*, 473 U.S. at 384.¹⁷

As the District Court found, AFLA supports activities that do not merely "go[] hand in hand" with the religious mission of religious grantees; they are an *integral part* of that mission. 657 F. Supp. at 1562-63. AFLA requires grantees to promote the values of premarital sexual abstinence over contraception and adoption over abortion. 42 U.S.C. §§ 300z(b)(2), 300z-1(a)(4)(B), (G), 300z-3(b), 300z-10. Certain denominations hold these values as fundamental religious tenets and are dedicated to promoting them as such. As to these grantees, the District Court concluded, the activities supported by AFLA and the organizations' religious mission were one and the same. 657 F. Supp. at 1562-63. There-

¹⁷ *Accord Wilson*, 423 U.S. at 250; *Sloan v. Lemon*, 413 U.S. at 810-32; *Levitt*, 413 U.S. at 479-80; see also *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

fore, it is clear on the face of the statute that AFLA advances the religious mission of these religious grantees.

The Government argues that AFLA cannot on its face be construed to advance the religious mission of grantees because it does not by its terms "require" that "pervasively sectarian" organizations be funded. U.S. Brief at 30. This argument is obviously wrong. The Court has often found facially invalid laws that did not expressly require support to "pervasively sectarian" organizations, if such organizations were in fact supported. In *Sloan v. Lemon*, 413 U.S. 825 (1973), for example, the Court struck down on its face a state law providing tuition reimbursements to parents who sent their children to "nonpublic" schools. *Id.* at 828. In an argument repeated here by the Government, the state maintained that, since the law did not *require* reimbursements be paid to religious schools, "no assumption [could] be made as to how individual parents [would] spend their reimbursed amounts." *Id.* at 831 (footnote omitted).¹⁸ The Court, of course, rejected that argument.

The District Court in fact found that, as applied, AFLA funded a significant number of AFLA grantees that were "pervasively sectarian."¹⁹ The record amply supports this finding. The AFLA programs of many religious grantees were directed by members of religious orders who were answerable to church officials. See, e.g., J.A. at 297. The instructors were, in many cases, themselves members of religious orders, or otherwise subject to the control of religious authorities. See, e.g., J.A. at 549-53. The AFLA programs of religious grantees were

¹⁸ See also *Walman*, 423 U.S. at 234-35, 248-51; *Nyquist*, 413 U.S. at 767-69; *Levitt*, 413 U.S. at 474-76, 480.

¹⁹ *Kendrick*, 657 F. Supp. at 1564 ("AFLA has in fact . . . funded 'pervasively sectarian' institutions . . ."); *id.* at 1566-67 ("[D]efendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for . . . a benefit to a 'pervasively sectarian' institution, or the use of tax dollars to 'teach' religion").

often conducted on sites adorned with religious symbols, including parochial schools, *see, e.g.*, J.A. at 467, and, on a few occasions, in conjunction with programs of religious instruction, *see, e.g.*, J.A. at 568. A large proportion of the individuals attending some of these programs belonged to the denomination with which the grantee was affiliated. *See, e.g.*, J.A. at 211-12, 264. In short, numerous AFLA grantees had all of the attributes of institutions that traditionally have been found to be "permeatively sectarian" by this Court. *Cf. Wolman*, 433 U.S. at 234-35.

The District Court's examination of the record also confirmed that, as applied, AFLA funded organizations whose stated purpose was to promote religious doctrines proclaiming the impropriety of abortion and contraception. One AFLA grantee, for example, stated that its existence was inspired by the Encyclical *Humanae Vitae*. That is the document of the Roman Catholic Church that establishes the propriety of abstinence and the impropriety of abortion and contraception as fundamental tenets of church doctrine. 657 F. Supp. at 1565. The court determined that at least ten AFLA grantees or subgrantees were similarly dedicated to promoting religious doctrines that require abstinence and forbid abortion as matters of faith. *Id.* As applied, the court concluded, AFLA advanced the religious mission of these grantees.

In attacking the District Court's "as applied" analysis, the Government dismisses as irrelevant the link between the values that AFLA was enacted to promote and the religious doctrine that religious grantees are dedicated to promoting. U.S. Brief at 33, 36. This approach not only is grandly naive; it relies on cases involving action by *government* entities—not action by *religious* organizations.²⁹ These cases clearly do not apply when *religious*

²⁹ *Harris v. McRae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *see also Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

groups are enlisted to promote values which, for these groups, are religiously inspired.

There is a vast difference, for example, between the government's enforcement of Sunday Closing Laws and government funding of religious organizations to enforce those laws. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Here, as in *McCollum v. Board of Education*, 333 U.S. 203 (1948), there is "direct cooperation between [government] officials and religious [authorities]," in the promotion of religious doctrine. *McGowan*, 366 U.S. at 452 (distinguishing *McCollum* on this basis).

Indeed, cooperation between government and religion in the promotion of religious doctrine lies at the heart of AFLA. Congress explicitly referred to the "complex . . . moral dimensions" of adolescent pregnancy to justify the involvement of religious groups.³¹ Congress also expressly acknowledged the peculiar effectiveness of these groups in promoting the values prescribed in AFLA.³² These determinations reflect Congress's intent to use these groups' religious faith to achieve the statute's objectives. This is far removed from cooperation between government and religious organizations in the delivery of nonideological, religiously neutral welfare services. *See, e.g., Bradfield v. Roberts*, 175 U.S. 291 (1899); *see also Wolman*, 433 U.S. at 244.

Because AFLA supports activities at the core of religious grantees' religious mission, the only remaining question is whether this aid is "direct and substantial." *Grand Rapids*, 473 U.S. at 393; *Wolman*, 433 U.S. at 250. If aid in the form of teachers and instructional material

³¹ S. Rep. No. 161, *supra* note 3, at 15-16 ("Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal.").

³² S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984).

to religious institutions is “direct and substantial” aid prohibited by the Establishment Clause,²³ there can be no doubt that the aid provided by AFLA—cash grants to religious entities for education and counseling—is “direct and substantial.” This is the form of aid “most clearly prohibited under the Establishment Clause.” *Grand Rapids*, 473 U.S. at 395; *see also Lemon*, 403 U.S. at 616-20.

C. AFLA Creates a Crucial Symbolic Link Between the Government and Religion

A symbolic benefit to religion follows inexorably from Congress’s decision to fund the promotion of values by religious organizations that hold those values as matters of religious faith. Congress’s decision may have rested on a determination that religious organizations were particularly effective in providing guidance on the “complex moral and social dimensions” of premarital sex and abortion. But just as the words of the servant are imputed to the master, so the voice of an AFLA-funded religious entity is heard as the voice of civil authority.²⁴ Such a message of governmental endorsement of religious values violates a “core purpose” of the Establishment Clause. *See, e.g., Grand Rapids*, 473 U.S. at 389; *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

AFLA directs its message at youth, who are especially likely to feel its influence. *See Grand Rapids*, 473 U.S. at 390; *see also Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985). On its face, the statute limits services primarily to those eighteen years old and younger. 42 U.S.C.

²³ See *Grand Rapids*, 473 U.S. at 395 (aid in the form of teachers and instructional equipment); *Wolman*, 433 U.S. at 248-51 (instructional materials); *Meek*, 421 U.S. at 365-72 (same).

²⁴ Cf. *McCollum*, 333 U.S. at 227-28 (separate opinion of Frankfurter, J.).

§§ 300z(b), 300z-1(a)(2), (9). The record indicates that several religious grantees targeted audiences much younger than 18. For example, St. Margaret’s Hospital offered AFLA programs to children in kindergarten through sixth grade (J.A. at 465), and Catholic Charities of Arlington, Virginia conducted AFLA program for junior high school students (J.A. at 212).

Distinct from the impermissible symbolic benefit accorded by AFLA to religion in general is the offense of AFLA’s support for the creeds of particular denominations. The values that AFLA requires grantees to promote—favoring premarital sexual abstinence over contraception and adoption over abortion—are ones over which various religious denominations sharply disagree. *See Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.). AFLA on its face takes sides on these issues. This by itself is not impermissible. But in making funds available to religious organizations to teach on these issues, AFLA inevitably excludes from participation religious organizations whose faith requires them to promote views that do *not* conform with AFLA’s values.²⁵ “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

In sum, the resulting message of disparagement of certain religions and endorsement of others arises not merely from the government’s promotion of values that conform with those of certain denominations. It arises as well from the government’s enlistment in a public undertaking of those religious organizations whose faith will make them particularly effective at promoting these values. The First Amendment “rests upon the premise

²⁵ See, e.g., J.A. at 603-04 (affidavit of Director of the Religious Coalition for Abortion Rights).

that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. *Accord Aguilar v. Felton*, 473 U.S. 402, 410 (1985). AFLA rests on an altogether different premise.

II. AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

A. AFLA's Impermissible Effects Are Unavoidable

The impermissible effects of AFLA grants to religious organizations could not be avoided even if the statute purported to prohibit the use of the grants for religious instruction. This Court has consistently held that direct aid for education and counseling of youth "inevitably" advances the religious mission of religious recipients, regardless of purported restrictions on its use. None of the authority relied on by the Government contradicts this principle.

The Government's reliance on decisions involving aid to religious organizations for religiously neutral welfare services is misplaced. Such services—diagnostic health testing, for example—comprise only a minor part of AFLA activities. Certainly, religious organizations were not included in AFLA because they were "particularly effective" in performing such tasks. Instead, the dominant purpose of AFLA funding was to enlist religious entities in providing "guidance" that will encourage adolescents to abstain from sex and choose alternatives to abortion.²⁶ Precedent concerning aid to religious organizations for social welfare services does not apply in the context of education and counseling.²⁷

²⁶ See 42 U.S.C. § 300z(b)(1), (2); S. Rep. No. 161, *supra* note 3, at 7-8, 20.

²⁷ As the Court has stated:

"The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no

The Government's reliance on decisions involving aid to religious organizations for higher education is likewise misplaced. Those decisions rely on factual and legal circumstances not present here. Specifically, in the college aid decisions instruction took place "in an atmosphere of academic freedom rather than religious indoctrination," and the recipients of aid were not otherwise "pervasively sectarian." *Roemer*, 426 U.S. at 750, 755-56.²⁸ Thus, it was the non—"pervasively sectarian" character of the institutions—which was manifested by, among other things, their dedication to intellectual openness—that rendered express statutory prohibition on religious uses enforceable.²⁹ In sharp contrast, many of the religious entities that have received AFLA funds were "pervasively sectarian."

Moreover, unlike the laws involved in the college aid decisions, AFLA does not even purport to prohibit the religious uses of funds. Nor does it purport to promote intellectual openness. In fact, the structure of the statute is antithetical to freedom of inquiry. Discussion of the positive aspects of abortion is absolutely prohibited under

educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship . . . does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student."

Wolman, 433 U.S. at 244. *See also Meek*, 421 U.S. at 371.

²⁸ *See also Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Tilton*, 403 U.S. at 686-87.

²⁹ *See Roemer v. Maryland Public Works Board*, 426 U.S. 736, 756 (1976); *Tilton*, 403 U.S. at 686; *cf. Widmar v. Vincent*, 454 U.S. 263 (1981).

the statute, and so in most cases is discussion of contraception.³⁰ Moreover, AFLA's administrators construed and applied these restrictions with a vengeance. For example, grantees were advised by OAPP that they "should not even know how to *spell* the word abortion" (J.A. at 93 (emphasis added)), even though the statute permits abortion referrals under certain conditions. See 42 U.S.C. § 300z-10. Finally, religious grantees, as the Government puts it, "are agreeable to the[se] restrictions by virtue of their religious beliefs." U.S. Brief at 33 (footnote omitted). This is understatement in the extreme. Many religious grantees by virtue of their beliefs refused to provide complete information on contraception and abortion even in the limited circumstances permitted under the statute.³¹

B. Any Attempt To Avoid AFLA's Impermissible Effects Would Violate the Principle of Nonentanglement

Any attempt to prohibit religious uses of AFLA funds would entail excessive entanglement between government and religion. Like AFLA, the laws struck down in *Lemon* provided financial subsidies directly to religious organizations for education and counseling of youth by instructors subject to the control of religious authorities. See 403 U.S. at 607-10. Like AFLA religious grantees, the recipients of the aid in that case were affiliated with

³⁰ 42 U.S.C. §§ 300z-3(b), 300z-10; S. Rep. No. 161, *supra* note 3, at 13, 20.

³¹ See, e.g., J.A. at 300, 310-11 (St. Ann's would not provide abortion referrals or information on contraception because of Catholic Church doctrine); J.A. at 314-17 (grant proposal of St. Ann's proposed to teach only the hazards of those birth control methods which were not approved by the Catholic Church); J.A. at 379-82 (Family of Americas Foundation's AFLA curriculum taught only negative aspects of abortion); J.A. at 407-09 (for religious reasons, St. Margaret's would not provide abortion referrals under any circumstances).

churches and dedicated to promoting the teachings of their church. *Id.* at 615-16, 620. They provided instruction, as have many AFLA-funded religious grantees, in pervasively sectarian settings. *Id.* at 615. Thus, in this case, as in *Lemon*, in order to prohibit religious uses of government aid, "comprehensive, discriminating, and continuing . . . surveillance [would] inevitably be required These prophylactic contacts [would] involve excessive and enduring entanglement between state and church." *Id.* at 619.

The degree of surveillance necessary under AFLA would likely be greater than that found excessive in *Aguilar v. Felton*, 473 U.S. 402 (1985). That decision reviewed the use of federal funds to pay the salaries of publicly employed professional educators who taught in parochial schools. These sorts of instructors are surely less likely to engage in religious instruction than are the members of religious orders and employees of religious organizations who conduct many AFLA programs. See *id.* at 427 (O'Connor, J., dissenting).³²

AFLA's invalidity under an entanglement analysis follows directly from *Lemon* and *Aguilar*, since the subject matter of AFLA instruction concerns values at the core of religious doctrine. Such subject matter creates a greater potential for presentation of religious views than does the traditional subject matter involved in *Aguilar* or *Lemon*. It would entail correspondingly more intense surveillance.

This level of surveillance inevitably would give rise to both of the concerns underlying the nonentanglement principle. See *Aguilar*, 473 U.S. at 409-10. As government involvement in the affairs of those denominations whose views conform to statutorily prescribed views increases, the exclusion of denominations with nonconforming views becomes more apparent, and hence more degrading. At

³² *Accord Meek*, 421 U.S. at 394 (Rehnquist, J., concurring in judgment and dissenting in part).

the same time, the freedom of those denominations with whom the government is involved also suffers. As the District Court recognized, even if it were possible to require AFLA counselors to put aside their religious beliefs when counseling adolescents, "government would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine." 657 F. Supp. at 1563 (emphasis in original). The effect is the forced "secularization of a creed." *Lemon*, 403 U.S. at 650 (Brennan, J., concurring).

Moreover, surveillance of religious AFLA grantees would breed an especially pernicious form of political divisiveness. The site of this surveillance would include not only parochial schools, as in *Lemon* and *Aguilar*, but also public schools, for religious grantees operate in both settings. The latter location, as much as the former, is an inappropriate environment for "numerous judgments [by public officials] . . . that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Aguilar*, 473 U.S. at 414. The prospect of religiously inspired disputes erupting in institutions of public education poses a severe threat not present in *Lemon* or *Aguilar*. "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577-78 (1987) (quoting *McCollum*, 333 U.S. at 231 (separate opinion of Frankfurter, J.)).

AFLA also creates the more typical form of political divisiveness that has troubled the Court. It sets non-religious education authorities against religious ones in a battle for scarce government education aid.³³ AFLA

³³ See, e.g., *Meek*, 421 U.S. at 365 n.15; *Nyquist*, 413 U.S. at 794-98; *Tilton*, 403 U.S. at 688-89; *Lemon*, 403 U.S. at 622-25;

affords religious organizations a distinct advantage in this competition by restricting discussion of contraception and abortion. These restrictions are at once "agreeable" to religious groups by virtue of their religious faith, U.S. Brief at 33, and repugnant to nonreligious education groups committed to evenhanded discussion that takes into account the religious and cultural diversity of those whom they serve. Thus, education by religious agencies is nourished at the expense of education by secular agencies.

In short, because AFLA unites government and religion in the promotion of values that lie at the heart of religious doctrine and at the fulcrum of denominational differences, it encourages the strife which the framers intended the Establishment Clause to prevent. "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against." *Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.).

C. AFLA Does Not Even Attempt To Prohibit Religious Uses of Public Funds by Religious Bodies

It is appropriate to analyze the level of government interference with religion that would be necessary to prevent the use of AFLA funds for religious purposes. See, e.g., *Meek*, 421 U.S. at 369-72. This analysis should not, however, obscure the fact that AFLA contains no such restrictions. Assuming for the moment that such restrictions were enforceable, the absence of a statutory prohibition of religious uses itself requires invalidation of

Walz, 397 U.S. at 698-700 (separate opinion of Harlan, J.); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

AFLA, regardless whether religious AFLA grantees are deemed "pervasively sectarian." See *Tilton*, 403 U.S. at 682-84.³⁴ Neither resort to a brief, isolated remark in a committee report nor informal adoption of an agency restriction cures this defect. "[W]here Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'"³⁵ The Court cannot save AFLA by construing it to imply a condition that Congress did not see fit to insert.

CONCLUSION

For the foregoing reasons, the judgment of the District Court holding AFLA invalid insofar as it involves religious organizations should be affirmed.

Respectfully submitted.

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³⁴ Accord *Roemer*, 426 U.S. at 759-61; *Hunt v. McNair*, 413 U.S. 734, 744 (1973).

³⁵ *School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1132 (1987) (Rehnquist, J., quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)) (dissenting opinion).

Supreme Court, U.S.

FILED

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JOSEPH F. SPANION, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES,

Appellant.

—v.—

CHAN KENDRICK, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF THE ANTI-DEFAMATION LEAGUE OF
B'NAI B'RITH ON BEHALF OF ITSELF AND
AMERICANS FOR RELIGIOUS LIBERTY, AMICI
CURIAE, IN SUPPORT OF APPELLEES**

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QUESTION PRESENTED

Whether the District Court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z, violates the establishment clause of the first amendment?

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AMERICANS FOR RELIGIOUS LIBERTY, AMICI
CURIAE, IN SUPPORT OF APPELLEES**

Amici support the position of appellees and respectfully submit that the judgment of the United States District Court for the District of Columbia in the above captioned case be affirmed.¹

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief of Appellees.

¹ Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend of the court in numerous cases dealing with issues of financing religious education, *see, e.g., Witters v. Washington Department of Services*, 474 U.S. 481 (1985); *Grand Rapids v. Ball*, 473 U.S. 373 (1985), as well as concerning prayer and other religious activities in the public schools, *see, e.g., Bender v. Williamsport*, 475 U.S. 534 (1986); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a nonprofit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

INTRODUCTION

The Adolescent Family Life Act, 42 U.S.C. §§ 300z ("AFLA"), in its provisions on care and prevention services involving teaching and counseling, authorizes an arrangement whereby the federal government funds the dissemination of religious doctrine concerning marriage, sexual relations and abortion by participating religious organizations. This dissemination occurs at churches or parochial schools. It occurs pursuant to overtly religious Christian curricula prepared by churches. The counseling often involves religious proselytizing—references to "God," to "Jesus Christ," to "Christianity" or "Christian values."

These religious overtones inhere in the AFLA program. It runs afoul of the first amendment establishment clause by being one of "those involvements of religious with secular institutions which . . . serve the essentially religious activities of religious institutions . . . [and] use essentially religious means to serve governmental ends, where secular means would suffice." *Abington School District v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring).

It is not simply that government and religious organizations here have a coincidence in mission. For both may oppose the evils of teenage pregnancy and both may share the laudatory goal to counsel against this evil. The issue is whether government may use the shortcut of existing religious organizations' chastity programs to reach its own secular ends. Under an "AFLA" like approach to other life and death issues, such as homicide, where government and religious organizations share concerns, government, instead of, or in addition to, establishing District Attorneys' offices, jails, etc. would finance church sermons and parochial school classes on the Biblical injunctions on "loving one's neighbor." If there were such a program, as in the instant case, government would be financing the missions of certain churches—religious means for secular ends. *See Abington*, 374 U.S. at 295. As under the AFLA, while the ends served would be laudable—the means would be religious and impermissible.

The AFLA program epitomizes the worst danger protected against by the establishment clause—the government sponsoring of religious doctrine to impressionable teenagers. To ask that government create its own programs rather than implement the existing ones of church organizations raises no issue of religious liberty. And, to ask that religious organizations pay for their own counselors frustrates no religious end. To the contrary, it would free the programs of these meddlesome governmental limits necessary to insure that the programs serve their goals free of sectarian indoctrination.

This case presents the first instance of congressional legislation invalidated as a “law respecting an establishment of religion.” U.S. Const. amend. I. Most recently reaffirmed in *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987), this Court has long applied a three-part test to determine whether legislation comports with the establishment clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute’s principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). State action violates the establishment clause if it fails to satisfy any of these prongs. Amici herein maintain the AFLA violates all three parts of the *Lemon* test.

The instant case calls for a heightened scrutiny because the Act’s programs are targeted to the counseling of teenagers. Where government, religion and school age children are mingled, this Court has shown particular concern. E.g., *Edwards*, 107 S.Ct. 2573, 2577.

Another reason for added concern here is the possibility not merely of some generalized support of government for religion, but rather of preferred support for some religions over others. The objectives served by the AFLA legislation are shared by some religions—namely Christian ones—more than others. Accordingly, the statute offers to some religions great benefits—to others none at all. This presents the worst estab-

lishment clause problem—the spectre of the preferred church. See *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

ARGUMENT

A. THE AFLA’S PREDOMINANT PURPOSE IS TO ENHANCE THE CHASTITY PROGRAMS OF RELIGIOUS ORGANIZATIONS.

The district court below considered whether the enactment of the AFLA was “motivated wholly by religious considerations;” and determined pursuant to this inquiry that the AFLA had a secular purpose. 657 F. Supp. at 1558.

Yet, the relevant purpose inquiry looks not to whether the sole purpose for the AFLA is religious, but rather to which is its “actual,” “clear,” “chief” or “predominant” purpose. As recently applied by this Court, “[t]he purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion.” *Edwards*, 107 S.Ct. at 2578, citing *Lynch*, 465 U.S. at 668, 690. See *Stone v. Graham*, 449 U.S. 39, 41 (1980).

As applied herein, the relevant inquiry asks what purpose the AFLA serves not adequately served by its predecessor statute, Title VI of the Public Health Service Act. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). See also *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom. Karcher v. May*, ____ U.S. ___, 108 S. Ct. 338 (1987). Title VI required applicants to involve “public and private agencies,” see Title VI § 605 (a)(7). The AFLA, however, explicitly *requires* applicants to describe how they will “involve religious and charitable organizations, volunteer associations, and other groups in the private sector. . . .” 42 U.S.C. § 300z-5(a)(21).

In its statutory analysis, the district court rightly noted the AFLA’s requirement of involvement of “religious organizations.” But the district court held this was not enough evidence of the statute’s exclusive religious purpose. 657 F. Supp. at

1559. Yet as discussed *supra*, this is too narrow a statement of the purpose inquiry. The AFLA's language amending the prior statute to include "religious organizations" points to what may have been the "actual" or "preeminent" purpose for the government legislation. *See Edwards*, 107 S.Ct. at 2528. Indeed, as the legislative history indicates, and appellants recognize, through the AFLA Congress expressly intended to draw upon the existing programs of religious organizations. S. Rep. 97-161 at 16, 97th Cong., 1st Sess. (1981), cited in Brief for the Appellants at 7-8. This legislative purpose threatens "the core rationale underlying the establishment clause . . . preventing 'a fusion of governmental and religious functions,' " *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982), citing *Abington*, 374 U.S. at 222.

B. INSOFAR AS THE AFLA IMPLEMENTS RELIGIOUS ORGANIZATIONS TO COUNSEL TEENAGERS ON CHASTITY VALUES, IT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION GENERALLY AND IN PARTICULAR THOSE RELIGIONS THAT PROMOTE CHASTITY.

1. The AFLA Prefers Those Religions Which Have Programs Indoctrinating In Favor Of Abstinence And Against Premarital Sexual Relations And Abortion.

a. The AFLA is Unconstitutional Under *Larson* For Discrimination Amongst Religions As Applied.

In funding religious organizations to educate and counsel concerning sex, marriage and abortion just as they would otherwise do, pursuant to their religious mission—through the use of religious curricula, religiously trained counselors and religious locales such as churches or parochial schools, the AFLA subsidizes certain religions in their religious missions, namely, as the record reflects, Catholic organizations.

In evaluating the constitutionality of this scheme, the district court held the AFLA survived "strict scrutiny" under *Larson v. Valente*, 456 U.S. 228 (1982), because the AFLA did not expressly discriminate amongst religions on its face. 657 F. Supp. at 557. Yet, even in the absence of discriminatory statutory language, this Court has long evaluated statutes and governmental policies for the preference or endorsement of one religion over another. *See Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. at 678. Since *Everson v. Board of Ed.*, 330 U.S. 1, 15, this Court has adhered to the principle, that no state can "pass laws which aid one religion" or "prefer one religion over another." As applied, the AFLA discriminates amongst religions insofar as it funds certain religions in the teaching of their values on marriage, sexual relations and abortion, while barring any aid to religions whose approaches differ. Such discrimination serves no compelling interest, and thus violates the test set forth in *Larson*.

b. The Record Shows Participating Religious Organizations Are Exclusively Christian and the Programs Involve Promulgation of Christian Doctrine.

The AFLA only funds the work of those religious organizations adhering to certain views on marriage, sexual relations, and abortion. The funded programs form an integral part of the participating religious organizations' broader education program promulgating their own religious doctrine—and not those of other religions. Thus, the adoption policy of Catholic Family Services, Amarillo, Texas, is "because of its religious doctrine." J.A. 156. The goal of Family of the Americas Foundation's Parental Adolescent Program "[is] to develop and disseminate in educational programs based upon the teachings of the Catholic church." J.A. 390. Catholic Charities of Arlington's program deals with the "values of the Church and community" and "the church's teachings on birth control and premarital sex." R. 155, A, III, 337-347; 222-A; 344-A-B

(Larson exh. 12; West dep. p. 137; Larson dep. pp 46-47). A priest lecturing for Catholic Charities relied throughout on Roman Catholic teachings "basing it all on Jesus Christ," with no mention of Jewish or Protestant teachings. R. 155, A, III-A, 401-403. (Hortum dep. pp. 37-38).

No Jewish organization, Reform, Conservative or Orthodox, has obtained any funding under this Act. While the Jewish view toward marriage, sexual relations and abortion is far from monolithic, it differs sharply from those adopted by the Christian grantee organizations.

As concerns sexual relations and marriage, in Judaism as opposed to Christianity, sex is considered a natural, and not a negative impulse. In Judaism, marriage is the highest human state, and not celibacy, as in Christianity. *Compare Kiddushin* 29b with *Matthew* 19:10. See *Genesis* 2:18, 24.

As concerns marriage and divorce, the Jewish view differs from the Christian in not considering marriage to be a sacrament, since its dissolution is possible. *Compare Deuteronomy* 24:1-4 with *Matthew* 19:16; *Mark* 10:9. As to abortion, most notably in Judaism, the fetus in the womb is not a person. B. Brickner, *Judaism and Abortion, Contemporary Jewish Ethics* 281 (1978), citing Rashi, *Yad Ramah*, & Meiri, *Sanhedrin* 72b. The Jewish view towards the status of a fetus is found in the Mishnah, a code of laws that dates back to the second century and forms the basis of the Talmud. Rashi, its preeminent commentator, explains "as long as the child did not come out into the world it is not called a living being, and it is therefore permissible to take its life in order to save the life of its mother." *Id.* at 271. This Jewish view conflicts sharply with the Christian view concerning the dilemma over the mother and the fetus.

That only the Christian and not the Jewish view on sexual relations, marriage, divorce, and abortion, are being taught pursuant to the AFLA is recognized by programs run by St. Ann's. Its resource material stated:

Our purpose here is not a discussion of comparative religions. . . . Our purpose is to explain what Christians mean by the transcendent level of life, a sharing in the life of God. . . .

Intercourse between married people is a way of saying with Christ, "my flesh, for the life of the world". . . .

The Jewish law allowed divorce under certain circumstances, but when Jesus was asked "may a man divorce his wife for any reason whatever?" he replied "let no man separate what God has joined."

R. 59 (O'Keefe Dep., Exh. 15).

No government monies should be promoting one religion's values over another. To do so is to threaten the religious beliefs of non-promoted religions. "[T]he first realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington*, 374 U.S. at 305. The AFLA's programs allow "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Larson*, 456 U.S. at 255.

2. Under Lemon, The AFLA Is Unconstitutional Both On Its Face And As Applied For Having The Primary Effect Of Advancing Religion.

The district court below found the AFLA's funding of teaching and counseling by religious organizations in matters constituting religious doctrine had the primary effect of advancing religion. The court found this impermissible, whether or not all the grantee religious organizations were determined to be "pervasively sectarian," because the financial aid provided under the AFLA as implemented by participating religious organizations is so inextricably tied to religious matters it cannot be confined to secular use; and thus cannot be constitutionally funded by government.

At the heart of the establishment clause's mandate is the bar on government aid to religious goals. "The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976). Direct aid—not limited to secular use—the Court has consistently found to have a primary effect of advancing religion. See, e.g., *Wolman v. Walter*, 433 U.S. 230 (1977) (provision of field trip transportation to nonpublic school students found to be an "impermissible direct aid to sectarian education"); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of instructional materials and equipment to nonpublic schools found to "inescapably result in the direct and substantial advancement of religious activity"); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (holding maintenance and repair grants to nonpublic schools "subsidize directly the religious activities of sectarian elementary and secondary schools").

The aid provided to religious organizations under the AFLA, the district court held, cannot be restricted to secular use because it directly subsidizes religious organizations in their religious missions. Determining the likelihood that aid will be for religious use is a twofold inquiry. Under *Hunt v. McNair*, it is barred: "when funding flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 734.

a. Through Institutional Ties To Religious Denominations and Corporate Requirements, Many of the Participating Religious Organizations Have a Primary Religious Purpose.

The district court below found pursuant to the twofold inquiry in *Hunt* that there is a likelihood of religious use on the face of the AFLA because the Act permits funding of a

number of organizations which are "pervasively sectarian."² While this characterization is not dispositive of the constitutionality of aid,³ it is relevant insofar as the limitation on aid for secular and not religious use simply cannot be drawn by institutions whose activities are permeated by religion. *Hunt*, 413 U.S. 737, 743 (1973).

The test used by this Court and by the district court below is a functional one, which depends on its facts. In its landmark case on the issue, *Bradfield v. Roberts*, the Court looked to a hospital charter of incorporation to determine whether its purpose was religious. 175 U.S. 291 (1899) (upholding construction grant to hospitals whose charter was silent on the question of the hospital's purpose). In *Tilton v. Richardson*, the Court allowed aid where religion did not so permeate the colleges "that their religious and secular functions were inseparable. On the contrary, there was no evidence that religious activities took place in the funded facilities. . . . [A]n atmosphere of academic freedom rather than religious indoctrination was maintained." 403 U.S. 672 (1971). Similarly in *Hunt*, the Court looked to whether "religion is so pervasive" in an institution "that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. 737, 743 (1973). Also relevant to the consideration is the degree of autonomy from the sponsoring denomination, *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976).

As applied to the grantees under the AFLA, the district court below examined the corporate purposes of the grantees

² The court used the term "religious organization," which it defined as organizations "that have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp. at 1565.

³ The question is not whether an organization is "pervasively sectarian." For even a pervasively sectarian organization such as a church is allowed secular aid such as fire or police protection. See *Everson v. Board of Education*, 333 U.S. 1, 17-18 (1947).

and held under *Bradfield* that at least 10 were "religious organizations" in that they had "explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine."⁴ See 657 F. Supp. at 1565 & n.16. In addition to those with formal corporate ties listed by the court below, at least four others were affiliated with religious denominations. Emory University's program is affiliated with the Methodist Episcopal Church. J.A. 504. Brigham Young University's program is "founded, supported and guided" by the Church of Jesus Christ of Latter-day Saints. J.A. 616. Cities in Schools' program is affiliated with an interdenominational religious program, J.A. 572; and Family of Americas Foundation is connected to the Vatican. J.A. 141. Other religious organizations did not have formal institutional ties, but otherwise evidenced "as a substantial purpose the inculcation of religious values." *Aguilar v. Felton*, 105 S.Ct. 3232, 3238 (1985), citing *Nyquist*, 413 U.S. at 767-68.

⁴ Appellant United Families of America objects to the district court's analysis of adherence to religious doctrine as an element in the court's inquiry as to whether the grantees would be able to serve a secular mission. See Brief of United Families of America at 39. Appellant suggests that adherence to religious doctrine need not impede a grantee's fulfillment of a program's secular objective, and that to bar participants on this basis is to burden the grantees' freedoms under the free exercise clause. *Id.*

Appellant's argument is inapposite. The free exercise clause does not require a government subsidy for religious practice. See *McGowan v. Maryland*, 366 U.S. 420 (1961). If it did, the first amendment religion clauses would work at cross purposes. The constitutionality of the government aid at issue hinges on whether an organization's secular and religious objectives may be separated, thus the question of a grantee's adherence to religious doctrine is central. Where the "religious mission" of an organization is pervasive, see, e.g., *Lemon v. Kurtzman*, 403 U.S. at 616, the Court has disallowed government aid, because state financial aid cannot be limited to supporting secular functions exclusively. See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 783.

Appellants reject the court's characterization of the grantees. They argue "pervasively sectarian" organizations should be limited to churches and church schools. See Brief of United Families of America at 39. Yet if this were the relevant consideration, the Court's inquiry in *Tilton, Hunt and Roemer* would not have looked toward the colleges' purposes. A similar analysis of the participating religious organizations herein reflects their religious mission, and thus the likelihood of use of the government aid herein for religious impermissible purposes. *Hunt*, 413 U.S. at 743.

The record is replete with evidence showing the AFLA programs have in no way been separated from the underlying religious missions of the participating grantee organizations. To the contrary they form an integral part of the participating organizations' broader religious missions. Catholic Family Services indicated its stance on adoption was "because of its religious doctrine." J.A. 156. Its grant program was regarded as "a welcome addition which will provide new opportunities to carry out the mission." J.A. 155. Similarly, St. Margaret's grant application states its services "are provided in accordance with the teachings and philosophy of the Roman Catholic Church." J.A. 459. See also J.A. 407.

b. The AFLA Provides Federal Funding to Religious Organizations To Teach Matters Inherently Tied To Religion.

As applied, the AFLA has the primary effect of advancing religion, under the twofold test set forth in *Hunt*, and this Court's recent *Grand Rapids* decision. What troubled the district court was the utter absence under the AFLA of any "effective means of insuring that public funds will be used exclusively for secular, neutral, and nonideological purposes. . ." *Committee For Public Education v. Nyquist*, 413 U.S. 756, 780. This Court has held the mere risk of government funding of religious indoctrination is enough to invalidate a program. "The lack of evidence of specific incidents of indoctrination" was held to be of "little significance."

Grand Rapids, 105 S.Ct. at 3226. *A fortiori* the instant scheme is unconstitutional. For there are specific incidents of unconstitutional funding found by the district court and conceded by appellants.

The AFLA allows tax dollars “to teach matters inherently tied to religion.” 657 F. Supp. at 1565. This religiosity is reflected in the curriculum used for AFLA programs, in the lectures of the government funded teachers, in the religious symbolism of the program sites, which are often parochial schools, churches or meeting rooms adorned by crucifixes. This Court has never before allowed government funding for religious books, *see Board of Education v. Allen*, 392 U.S. 236 (1968), for salaries of teachers of religious courses, *McCollum v. Board of Education*, 333 U.S. 203 (1948), nor for teachers of any subject, secular or religious, when the courses are on church or parochial school premises. *Grand Rapids*, 473 U.S. 373; *Lemon*, 403 U.S. 602. Yet this aid is precisely what the AFLA allows.

i. Religious Materials

The use of curricula expounding church doctrine reflects the religiosity of the AFLA funded programs. Government sponsorship of such religious materials has long been unconstitutional. *See, e.g., Abington v. Schempp*, 374 U.S. 203. The district court found St. Margaret’s used curricula including explicitly religious materials. J.A. 36a. Catholic Charities of Arlington’s program included discussions regarding “the Church’s teaching on birth control [and on] premarital sex.” R. 155, A, III at 342 (Larson exh. 12, Doc. 4477). The religious curriculum outline used by St. Ann’s AFLA program discusses “the Christian tradition” of marriage and relies on Biblical material concerning sexual relations and marriage. Catholic Charities’ grant program employed a religious bibliography entitled “Reverence for Life and Family” used in several dioceses for Catholic sex education in parochial schools. *See* J.A. 115-116. *See also* J.A. 379 (Families of the Americas Foundation’s pamphlet on “The Christian Alternative, Billings Ovulation Methods” which says the ovulation method helps

show “the family is an integral part of the Church.”). Center for Life’s Adolescent Program materials provide “a more Christian pro-life education in sexuality,” and refer to “a fully human Christian understanding of life and love.” J.A. 370-371.

ii. Religious Teaching

Religious indoctrination is not a mere possibility; it is actuality here. The instructors used in the AFLA programs, many of whom are involved in the grantees’ non-AFLA religious programming, include church ministers, *see* J.A. 485 (GUAGT Program) or instructors from area churches, *e.g.*, J.A. 476 (SEMO). SUMA and Catholic Charities of Arlington used “spiritual counseling,” and “religious discussions” in the midst of an AFLA program. J.S. App. 36a-37a. As this Court recognized in *Lemon* and in *Grand Rapids*, the services of the state-supported—but religiously trained—teachers herein cannot remain purely secular. In *Grand Rapids*, this Court held that parochial school teachers, trained to educate pursuant to the tenets of their church, would not be able to switch gears after the regular parochial schoolday so as to teach an entirely secular course, *see* 105 S. Ct. at 3224. Yet this improbability is exactly what is expected under the AFLA.

iii. Religious Sites

In addition to using religious curricula, many of the grantees conducted their teaching and counseling at churches, parishes and Catholic schools. These included Catholic Social Services, S.W. Ohio; Catholic Charities of the Diocese of Arlington, VA; Families of the Americas, Inc.; Catholic Family Services; and St. Ann’s. J.A. 114, 117, 340, 379, 448, 449, 456. Other program sessions have been conducted in meeting rooms adorned with religious symbols, such as crucifixes. J.A. 299; 437 (St. Ann’s); J.A. 463 (St. Margaret’s).

Government funded programs, this Court has held, may not be conducted on churches or parochial school sites lest there be the appearance of government support of religion. *See Grand Rapids*, 105 S. Ct. at 3225. The Court has also recognized that

religious symbols cannot be endorsed by government. See *Stone v. Graham*, 449 U.S. 39 (1980). See also *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), cert. denied, ____ U.S. ___, 107 S.Ct. 458 (1986) (holding cross is the fundamental symbol of Christianity and cannot be sponsored by government). The Court held in *Grand Rapids* that "students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." 105 S. Ct. at 3225. *A fortiori*, the effect of advancing religion is even stronger here than in *Grand Rapids* because unlike the secular education courses taught in the parochial schools in *Grand Rapids*, the AFLA programs involve the teaching at religious sites of fundamental Christian doctrine.

The holding of AFLA programs on such sites presents a twofold problem. To the believing adolescent it sends a message of endorsement of Christianity. To the unaffiliated adolescent, it sends a further message of exclusion at a time already marked by alienation. See *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

iv. Impressionable Teenagers

In funding teaching and counseling on matters related to religious doctrine, the AFLA allows a worst case scenario of "direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs." *Grand Rapids*, 105 S.Ct. at 3226. Like the program in *Grand Rapids*, the AFLA program contemplates teaching of high school aged children by government funded teachers at religious sites. But, unlike the programs in *Grand Rapids* which involved classes in groups, the AFLA contemplates one on one counseling—the situation most ripe for abuse.

"Examination of both the subjective and objective components of the message communicated by a government action is . . . necessary." See *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). In addition to the objective aid to religious doctrine provided by the AFLA, the district court considered the

subjective element presented by the school age children affected by the program. "[T]he statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and underinformed adolescent to whom the instruction is directed." 657 F. Supp. at 1563. This Court has long recognized the relative susceptibility of elementary and secondary school age students to indoctrination. Compare *Lemon*, 403 U.S. 602, with *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). Cf. *Widmar v. Vincent*, 454 U.S. 263, 271. Adolescents are considered by the Court to be impressionable and thus more likely to misunderstand government support for the program herein as government support for religion. See *Edwards*, 107 S.Ct. at 2577.

The problems raised by the implementation of the AFLA cannot be dismissed as isolated establishment violations as the government suggests. See Brief for the Appellant at 41. These problems show that the religious nature of the grantee organizations, as well as the inherent tie to religion in funding the instant services, make it difficult to separate the secular from the religious as the first amendment's neutrality mandate requires.

c. The Effect of Advancing Religion is Not Mitigated by the AFLA's Extension of Government Aid to Nonreligious Organizations.

Though the instant program allows direct aid to religious organizations for teaching of matters related to religious doctrine, appellants maintain the establishment clause permits such aid so long as it is also provided to nonreligious organizations; this, appellants suggest, makes the aid "neutral" in nature.⁵ See Brief of United Families of America at 20-32. Yet this is not the "neutrality" the establishment clause requires. The establishment clause here takes precedence over any fa-

⁵ Appellant notes the statute is neutral on its face, and that in practice about one fourth of the grantees are religiously affiliated. Brief of United Families of America at 25 n.14.

cially evenhanded treatment of secular and sectarian organizations. The bar against funding for religious use presents a problem solely for religiously affiliated organizations and this narrows the analysis. See *Lemon*, 403 U.S. at 612.

In one case after another involving state aid to private institutions of higher education, this Court has focused not on the neutrality or merits of state programs as a whole, but rather on the eligibility for aid of specific sectarian recipients. In *Roemer*, for example, the Court analyzed whether four Catholic colleges in Maryland could receive state funds available to all private schools of higher education in that state. 426 U.S. 736 (1976). In *Tilton*, 403 U.S. 672, this Court focused specifically on four church-related colleges in Connecticut to determine their eligibility for federal grants also offered to many other schools. In *Hunt*, 413 U.S. 663, this Court considered the eligibility of one Baptist-controlled college to benefit from the issuance of revenue bonds intended to support all private colleges in South Carolina. In each of these decisions, the Court recognized the secular nature and overall merit of the states' efforts to assist private colleges and universities. Nevertheless, as the *Hunt* Court emphasized, to identify primary effect it is necessary to narrow the Court's focus "from the statute as a whole to the only transaction presently before us." 413 U.S. at 744. To do otherwise here would be to depart from those establishment clause precedents which have long served effectively to ensure the separation of church and state by limiting government aid to secular use.

Further, the examples of "neutral" aid appellants rely on, which have been permitted to an array of religious and nonreligious beneficiaries, are fundamentally difficult from the aid for teaching and counseling herein. Police and fire protection have long been afforded even to "pervasively sectarian" organizations, see *Everson v. Board of Education*, 333 U.S. 1 (1947). See also *Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (tests); *Wolman v. Walter*, 433 U.S. 230, 241 (1977) (diagnostic services). Unlike government funding of teachers, this sort of government aid presents no risk of

converting from permitted secular to forbidden religious use. See *Grand Rapids*, 105 S. Ct. at 3225; *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968) (secular textbooks).

Greater flexibility has been countenanced when government aid goes not directly to a religious institution but indirectly to an individual. It is the "indirect" nature of aid allowed to an individual, and, not the array, the Brief of United Families at 25, to the contrary, which mitigates the effect of government funding for religious training.⁶ See, e.g., *Witters v. Washington Department of Services*, 106 S. Ct. 748, 752 (1986). See *Widmar v. Vincent*, 454 U.S. 263 (1981). See also *Mueller v. Allen*, 463 U.S. 388, 398-400 (1983).

Here, unlike in *Witters*, *Mueller*, or *Widmar*, the AFLA affords no aid to individual beneficiaries. There is no private action to attenuate the message of direct government funding to religious organizations for religious education.

C. INSURING THE AFLA IS CONSTITUTIONALLY IMPLEMENTED EXCESSIVELY ENTANGLES STATE AND RELIGION IN VIOLATION OF LEMON.

1. Implementing the AFLA Involves Unconstitutional Administrative Entanglement of Government and Religious Institutions.

Under *Lemon*, the AFLA may not foster an "excessive governmental entanglement with religion." 403 U.S. at 612-13. The district court below held the "religious organization" grantees had such religious character and purpose that insuring AFLA funds were isolated only for secular uses would require

⁶ Another form of indirect aid is presented by *Walz v. Tax Commission*, 397 U.S. 664 (1970). *Walz* involved an extension of tax exemption to churches. In so doing, *Walz* obviously did not stand for the proposition that it is all right for government to fund churches. Rather, *Walz* presented the Hobson's choice either of government affording churches an exemption, and thus helping churches financially or churches paying taxes and thus aiding government. Presented with these choices, the Court held an exemption would involve less ongoing involvement between government and religious organizations—ultimately advancing the separation of church and state.

a level of surveillance constituting "excessive entanglement." 657 F. Supp at 1567.

Moreover, since the aid at issue is funding for teaching or counseling services, the risk of advancing religion by these religious organizations is attendantly greater—necessitating, the court found, "continual governmental monitoring." 657 F. Supp at 1568.

Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.

We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.

These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 618-619.

Even the mere potential of such continuous monitoring of government with religion in situations involving state funded teaching has been deemed excessive and violative of the first amendment. See *Aguilar v. Felton*, 473 U.S. at 410. But, under the AFLA, such continual monitoring is not a risk, but a reality.

The record reflects that government has already been involved in continuous supervision of the religious organizations for abuses in the AFLA programs. In conceding the "departure from proper constitutional principles in individual AFLA programs," Brief of Appellant at 40-41, the government noted that the unconstitutional abuses in the AFLA programs, including "religious discussions" J.S. App. 36a (SUMA), were rapidly "met with firm action by the Secretary." *Id.* at 41. The

supervision has included correspondence, J.A. 518 (HHS letter to St. Margaret's); J.A. 674 (HHS letter to St. Ann's), personal conferences, J.A. 92, and telephone calls, between government officials and religious organization personnel. J.A. 106-107, 112-113, 160 (HHS would affirmatively call Catholic applicants to seek assurances that they would not promote religion).

The AFLA's implementation has already required excessive contacts between administrative personnel of government and church-affiliated organizations. This joining of government and religious enterprises violates the establishment clause's "objective . . . to prevent as far as possible, the intrusion of either [church or state] into the precincts of the other." *Aguilar*, 105 S. Ct. at 3239, *citing Lemon*, 403 U.S. at 614.

Paradoxically, the entangling aspects of the AFLA ultimately diminish the religious freedom of the "benefitting" religious organizations. As held by this Court in *Aguilar*, aid of the sort contemplated here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." 105 S.Ct. at 3241, *citing Walz*, 397 U.S. 664.

2. The AFLA Presents Problems of Political Divisiveness Amongst Religions.

In addition to the administrative entanglement present herein, the AFLA "involve[s] a direct subsidy to . . . religious institutions, *see Lynch*, 104 S.Ct. at 1365, *citing Mueller v. Allen*, 103 S.Ct. 3062, 3071 n.11 (1983), and thus triggers political divisiveness amongst religions.

Given the major distinctions amongst religions on the issues taught pursuant to the AFLA, discussed *supra*, competition for funding under the Act automatically results in political divisiveness along religious lines. *See Lemon*, 403 U.S. at 622. This is one of the central dangers against which the establishment clause was designed to protect. *See Committee for Public*

Education v. Nyquist, 413 U.S. at 798. As Justice Harlan declared, governmental involvement in programs concerning religion:

[M]ay be so direct or in such degree as to engender a risk of politicizing religion. . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.

Larson, citing *Walz*, 397 U.S., at 695 (concurring).

CONCLUSION

For all the reasons above, *amici* ask that the AFLA be declared unconstitutional in violation of the first amendment establishment clause.

Respectfully submitted,

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No. 87-431, 87-253, 87-775, 87-462

Supreme Court, U.S.

F I L E D

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITARIAN UNIVERSALIST ASSOCIATION, THE UNITED SYNAGOGUES OF AMERICA, CATHOLICS FOR A FREE CHOICE AND THE EPISCOPAL WOMEN'S CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

This amicus curiae brief is submitted in support of appellees Chan Kendrick, et al. By letters filed with the Clerk of the Court, appellant, appellees and intervenor-appellants have consented to the filing of this brief.

Amici are religious organizations representing over two million persons and thousands of clergy and congregations in all fifty states. While amici have different religious traditions and beliefs, all are deeply committed to the constitutional principle of religious liberty embodied in the Establishment Clause. The statement of interest of individual amici are set forth in the Appendix.

Amici submit this brief limited to the issue of the constitutionality of the

Adolescent Family Life Act (hereinafter "AFLA"). Amici do not address the issues of standing or severability.

SUMMARY OF ARGUMENT

This case involves issues of central importance to the Establishment Clause. AFLA violates each Establishment Clause test articulated by this Court.

The statute both on its face, discriminates among religious denominations based on their religious tenets. Such facial discrimination requires the application of strict scrutiny. Larson v. Valente, 456 U.S. 288 (1982). AFLA does not pass muster under the strict scrutiny test because there is no compelling state interest which justifies the direct funding of certain religious organiza-

tions to teach and counsel based on their religious tenets.

AFLA also fails each prong of the Lemon v. Kurtzman, 403 U.S. 602 (1971) test. An actual purpose of AFLA is to involve religions in their traditional sectarian role as transmitters of values and to promote a religious response and solution to a secular problem. AFLA changed the law of an existing statutory program on adolescent pregnancy by inserting explicitly religious references and AFLA permits the use of explicitly religious material in its programs which indicate government's endorsement of religion. Wallace v. Jaffree, 472 U.S. 38 (1985).

AFLA has the direct effect of advancing religion in that it provides federal funds directly to grantees including churches and parochial schools for teaching and

counselling on subjects which are at the core of religious belief and inherently susceptible to religious indoctrination, Lemon v. Kurtzman, supra; School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). AFLA subsidizes the religious mission of sectarian grantees by, inter alia, funding pre-existing programs and financing programs and material made available only to members of particular congregations and faiths.

AFLA lacks any statutory safeguards to assure that aid cannot be diverted to religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). AFLA constitutes an endorsement of religion, which is of particular constitutional concern because the AFLA program is directed to children and adolescents who are

more likely to perceive government sponsorship of a program run by a religious organization in a religious setting using explicitly religious material as government endorsement of that theology. School District of Grand Rapids v. Ball, supra.

Finally, AFLA compels excessive entanglement of government and religion in the administrative review and audit of AFLA programs, Aguilar v. Felton, 473 U.S. 402 (1985), Lemon v. Kurtzman, supra. In operation the entanglement of government and religion has been pervasive, at every level, from review of grant proposals, to approval of teaching materials to routine site visits and financial audits. Aguilar v. Felton, supra.

Measured by any of this Court's Establishment Clause tests, AFLA is unconstitutional.

I.

THE SIGNIFICANCE OF THIS CASE

The Adolescent Family Life Act ("AFLA") on its face and as it has operated, fails each Establishment Clause test articulated by this Court and jeopardizes the constitutional values of religious neutrality and separation that are the cornerstones of constitutional liberty. The statute explicitly permits and contemplates the payment of federal funds directly to churches and other religious organizations for programs that counsel and instruct children and adolescents in subjects such as family life, sexuality and marriage, topics which are inherently susceptible to religious indoctrination. Consistent with the intent of Congress, that is precisely what has happened. Some of the federally sponsored programs have been held in religious

settings including churches and parochial schools.

AFLA on its face and in operation violates the most fundamental precepts of Establishment Clause. In Everson v. Board of Education, 330 U.S. 1, 16 (1947) Justice Black wrote for the Court:

. . . no tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion.

Recently this Court reiterated the continued vitality and understanding of this absolute prohibition:

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.

Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985) (citations omitted).

AFLA provides government financing for activities which constitute religious indoctrination.

The appearance of government endorsement of particular religious views inherent on the face and in the practice of AFLA is unprecedented in recent Constitutional history. (See Point IV, infra). An equally grave constitutional violation is the explicit discrimination among religious denominations, based on theological content. (See Point II, infra).

From the time of drafting of the Bill of Rights to the most recent decisions of this Court interpreting and applying the Establishment Clause, the importance of strict enforcement of the separation of church and state in protecting fundamental liberty has been recognized:

The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion. . . . It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional. . . . The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Grand Rapids School District v. Ball, 473 U.S. at 381.

A review of the extensive record of this case is chilling -- and establishes beyond peradventure that AFLA funds have been used, with government knowledge and approval by religious organizations to disseminate explicitly religious material on sexuality and childbearing to young people. This is precisely the sort of government supported indoc-

trination that the Establishment Clause absolutely forbids.

II.

AFLA IMPERMISSIBLY DISCRIMINATES AMONG RELIGIOUS DENOMINATIONS

AFLA violates the fundamental constitutional principle of neutrality among religious denominations. On its face and as applied the AFLA effects an impermissible discrimination among denominations, and thus it cannot survive this threshold Establishment Clause test.

The District court failed to apply the clear precedents of this Court on discrimination and erred in finding that strict scrutiny was not required because AFLA "does not discriminate on the basis of religious affiliation or belief." 657 F.Supp. at 1557.

Denominational neutrality is a central principle embodied in the Establishment Clause. Government may not "pass laws which aid one religion" or that "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947); see also Zorach v. Clauson, 343 U.S. 306, 314 (1952). Most recently the Supreme Court expressed and applied this principle in Larson v. Valente, 456 U.S. 228, 244 (1982):

The clearest command of the Establishment Clause is that one denomination cannot be preferred over another.

When a statute affecting religious organizations discriminates among religious denominations on any grounds, a court must "treat the law as suspect and ... apply strict scrutiny in adjudging its constitutionality." Larson v. Valente, 456 U.S. at 246. AFLA distinguishes among religions on the basis of

theological content, and thus is more invidious than the discrimination invalidated in Larson v. Valente, 456 U.S. 228 (1982). The discrimination is particularly clear since AFLA, unlike the program invalidate in Larson involves direct payment by the government to religious organizations. The benefit is direct, financial and substantial.¹ AFLA

¹ A necessary characteristic of government programs that aid or assist religion without violating the Establishment Clause is that the government aid be equally available to all religious groups. See, e.g., Everson v. Board of Education, 330, U.S. 1, 13-14 (1947) (transportation of all non-public and public school children); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (released time off school premises for any religious instruction); Walz v. Tax Commission, 397 U.S. 664 (1970) (property tax exemption for religious and non-religious property); Roemer v. Board of Education Public Works, 426 U.S. 736 (1976) (grants to all private colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants to all public and private schools); Mueller v. Allen, 463 U.S. 388 (1983) (income tax deductions for parents of either private or public school children). In sharp contrast, AFLA aid in the form of direct (footnote continued)

clearly effects discrimination among denominations. The combination of an explicit invitation to religious organizations to participate in AFLA programs in their religious capacity and the restrictions on grantees based on their view of abortion limits the participation by "religious organizations" to certain religious denominations. Amici organizations are among the many religious denominations foreclosed from participating in AFLA because they cannot conscientiously counsel adolescents on pregnancy and not discuss the option of abortion.

It is incontrovertible that religious denominations position on abortion vary. Some religions view abortion as a always a sin against God, others view abortion as an option

(footnote continued from previous page)
payments is not available to all religious denominations.

to be pursued under some circumstances, whereas other religions view abortion as a matter of conscience and a religious choice. J.A. 590-607. Amici firmly believe that each denomination approaches the issue as a serious matter of faith (see J.A. 590-607) and that the government must accord each religious position with equal respect. AFLA discriminates among religions by endorsing some explicitly religious teachings on abortion (through financing, publication and dissemination), to the disparagement and detriment of other, equally sincere religious teachings on the subject. This government sponsorship and endorsement of explicitly religious teaching on a religious subject which are inconsistent or antithetical to other religious teachings, is at the core of the constitutional protec-

tions afforded by the Establishment Clause.² "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Everson v. Board of Education, 347 U.S. 1, 15-16 (1947)

Methodist religious principles teach that individuals have a moral obligation to make a fully informed and conscientious decision about pregnancy. (J.A. 683)

² Harris v. McRae, 448 U.S. 297 (1980) is not relevant to consideration of the discrimination claim. At issue here, unlike McRae, is the propriety of the federal government's direct funding of religious organizations to teach and counsel children and adolescents on their religious tenets on abortion. A review of the material created and used by AFLA grantees proves unmistakably that the abortion is presented in a theological or religious context. E.g., J.A. 257, 274, 426, 513. While as this Court found abortion may be a moral or secular or health issue for a government, it is quite clear that for the religious grantees of ALFA abortion is a religious issue on which they speak religiously. Cf. Stone v. Graham, 472 U.S. 39 (1980).

Unitarian principles on abortion also promote conscientious decision making by individuals on the issue of abortion.
(J.A. 683)

Mainstream Jewish religious teaching is that personhood of a fetus is attained at birth, so abortion cannot be characterized as "murder" or "killing." (J.A. 599-600, 683) Abortion may be acceptable under certain specific conditions, particularly those in which the mother's physical or psychological health is threatened.

Since AFLA does not permit participation by grantees who counsel or refer for abortions and in programs funded by AFLA proscribes discussion of abortion consistent with these religious mandates, amici and other religious organizations cannot participate in AFLA in the manner that Catholic, Mormon and

fundamentalist religious organizations are permitted by the statute and do participate -- as religious organizations.³

Many if not most religious denominations, churches and synagogues, sponsor programs and counsel adolescent members on issues of family life, sexuality, relationships and marriage. Amici operate such programs in their churches and synagogues.

The record is clear that AFLA funds have been used to support and promote pre-existing Catholic, and fundamentalist programs

³ Amici note that while the proscription against dissemination of their religious position on abortion as a conscientious choice and an option all or in some circumstances in dealing with unwanted often health or life-threatening teenage pregnancy is manifest in the statute, see 42 U.S.C. 300z, and in the administration of the statute, there is apparently no restriction placed on religious grantees from writing or speaking about abortion as sinful or wrong. AFLA grantees have published material and counselled adolescents on that basis under the auspices of AFLA. See J.A. 274, 426, 513.

of family life, sexuality, relationships and marriage. See, e.g., J.A. 210, 223. Not only is this financial aid a direct advancement of the religious mission of those churches (see Point IV, infra) but it also constitutes the most invidious form of discrimination among religious denominations.

No compelling state interest justifies this discrimination. The appropriate inquiry in the case at hand is whether there is a compelling state interest to involve directly and fund certain religious organizations as part of the government's response to the problem of adolescent pregnancy. No compelling state interest has been proffered. Amici contend that there is no such compelling state interest.

Assuming arguendo, that the state interest is the prevention of adolescent

pregnancy through teaching "chastity" and discouraging abortion, then the means employed to achieve that goal, i.e., provision of federal funds directly to certain religious organizations (and foreclosing others) are not sufficiently narrowly tailored. If there is a legitimate secular purpose in teaching chastity, then the government must use exclusively secular means to achieve it. Because there is no compelling state interest which justifies the discrimination among religious groups caused by the AFLA, it cannot survive the strict scrutiny that must be applied.

III.

AFLA LACKS A SUFFICIENTLY
SECULAR PURPOSE AND EMPLOYS
CONSTITUTIONALLY IMPERMISSIBLE
RELIGIOUS MEANS TO ACHIEVE
PURPORTED SECULAR GOALS

The first requirement of a legislative program is that it have a secular pur-

pose. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Epperson v. Arkansas, 393 U.S. 97, 98 (1968); Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Mere articulation of a "secular purpose" for challenged legislation is not "sufficient to avoid conflict with the First Amendment." Stone v. Graham, 449 U.S. 39, 41 (1980). The court must look beyond "avowed" purpose of the challenged statute or program and determine whether the "actual purpose" of the legislation is to endorse or disapprove of religion.

Amici believe that there exists a legitimate, secular concern for addressing and alleviating the life-and health-threatening problems which often result from teenage pregnancy. Amici have supported government programs of free, confidential health care and counselling for adolescents. However, it is

clear that a real purpose of AFLA is to involve certain religions in their traditional sectarian role as transmitters of religious values, and to promote a religious solution to the secular problems relating to teenage pregnancy, by directly funding certain religious organizations. That the government may not do. Amici contend that valid secular objectives concerning teenage pregnancy can and must be addressed by the government without resort to direct funding of a few religious organizations.

The Establishment Clause forbids not only government aid to programs which seek to achieve explicitly sectarian goals, but also "the use of religious means to achieve secular ends where non-religious means will suffice." School District of Abington v. Schempp, 374 U.S. 203, 280-81 (1963) (concurring opinion of

Brennan, J.). AFLA clearly transgresses this "means" test. Defendant cannot show that participation by and financial support of religious organizations are necessary to achieve any proper secular goal.

As Establishment Clause jurisprudence has developed over two decades, the secular purpose prong of the tripartite Lemon test, although the most easily satisfied, is not inevitably met. Government programs have been invalidated for lack of secular purpose where the program imposed religious material in secular educational programs for children and adolescents. Epperson v. Arkansas, 393 U.S. 97 (1968); Stone v. Graham, 449 U.S. 39 (1980) or amended an existing statutory scheme to add an explicit religious reference and endorse religion. Wallace v. Jaffree, 472 U.S. 38 (1985). AFLA, which amended an exist-

ing statutory scheme by including explicit religious references, and has used and imposed religious material in its programs directed at children and adolescents. (See, e.g., J.A. 234, 344-53, 367-68; 417-426).

The purpose prong of the Lemon test as refined by this Court in Wallace v. Jaffree, 472 U.S. 38 (1985) is an inquiry into whether the "actual purpose" of the statute "is to endorse or disapprove of religion." 472 U.S. at 56 citing Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, concurring). The methodology utilized by the Court for examining the "actual purpose" of the challenged statute-scrutiny of both legislative history and the replaced statutory program, is applicable and appropriate in this case. Here, as in Jaffree, such examination reveals clearly that an actual purpose of AFLA is to endorse

religion -- specifically to endorse and finance an explicitly religious approach to a secular problem.

The legislative history makes clear that the sponsors of AFLA were "motivated to change the law," Jaffree 472 U.S. at 59. Congress repealed an existing teenage pregnancy prevention program and enacted AFLA in order to promote a religious solution to the problem of teenage pregnancy. The addition of numerous references to religion in the statute itself and the imposition of a programmatic requirement that all grantees religious or secular, involve religions in their program⁴ are more than an "indications" that Congress intended to characterize religious teaching on adolescent sexuality and pregnancy as a "favored" - and funded - practice. Jaffree,

472 U.S. at 60. "Such an endorsement is not consistent with the established principle that government pursue a course of complete neutrality toward religion." Id. (citations omitted). The Alabama statute at issue in Jaffree unmistakably endorsed religion. No less clear is the endorsement of religion embodied in AFLA.

The District Court's formulation and application of the purpose test (657 F.Supp. at 1558-9) is inconsistent with the standard articulated by this Court in Wallace v. Jaffree, and Lynch v. Donnelly (O'Connor, J. concurring). The Court failed to make the detailed comparison of the old statutory scheme and AFLA, which comparison reveals that a significant purpose of the legislation was to endorse a religious response to a secular problem.

⁴

42 U.S.C. § 300-5(a)(21).

However, even assuming arguendo that AFLA reflected a proper secular purpose, the statute must still be invalidated if it fails either the effect or entanglement prong of the Lemon test.⁵ It is abundantly clear that AFLA fails both.

IV.

AFLA HAS THE DIRECT EFFECT OF ADVANCING RELIGION

Government action "may neither advance nor inhibit religion." Lemon v. Kurtzman, 403 U.S. at 612. The second prong of the Supreme Court's Establishment Clause test determines whether a statute has a direct

⁵ "This court has announced a three-part test for determining whether a challenged . . . statute is permissible under the Establishment Clause . . . If a statute violates any of these three principles, it must be struck down under the Establishment Clause." Stone v. Graham, 449 U.S. at 40. (Emphasis supplied.)

effect of advancing religion. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). The District Court's holding that on its face and as applied AFLA has "the primary effect of advancing religion" (657 F.Supp. at 1551) is fully supported by the law and the substantial factual record.

In determining the effect of a challenged program this Court has examined three factors: (1) the nature of the aid; (2) nature of the activities sponsored; and (3) the nature of the institution or individuals receiving the aid. AFLA provides federal funds directly to grantees, and permits religious organizations, including churches, to become grantees and thus to receive federal funds directly for programs of teaching and counselling. AFLA programs involve one-on-one

and group counselling and teaching on issues such as sexuality, marriage and pregnancy. AFLA funds are used to pay teacher and counsellor salaries and fund the creation, and dissemination of written and media materials. Thus the nature of the aid involved is comparable to teachers' salaries, textbooks and instructional material considered by the Court in Lemon, supra; Meek, supra; Aguilar, supra; and Wolman v. Walter, supra. The direct provision of funds to sectarian institutions for this purpose, is intolerable under the Establishment Clause.⁶

⁶ Amici submit there is no question that the involvement of religious organizations contemplated under AFLA is qua religious organization, not because the religious organization performs a secular task, e.g. operates a hospital. It strains credibility to argue that religious organizations were included in AFLA only to the extent that religious organizations sponsor and participate in community organizations. Such an interpretation renders the statutory language redundant.

(footnote continued)

AFLA has subsidized the primary religious mission of sectarian institutions that receive its funds by augmenting or combining with their religious education, e.g., J.A. 117, 166, 210, 223, 341, 408, 412-13. AFLA programs have been directly controlled by the religious aim of grantees including priests and parish advisory committees, J.A. 147, 197.

The Supreme Court has struck down numerous government programs that provided aid directly to religious schools or to teachers employed by religious schools, as AFLA provides aid directly to religious institutions and/or their employees, because such programs

(footnote continued from previous page)

Moreover, examination of the programs actually funded shows that direct involvement by core religious functions such as parishes and parochial schools and the use of explicitly religious material is deemed by the government to be within the purpose of the act.

inevitably advance religion. Grand Rapids School District v. Ball, 473 U.S. 373 (1985). Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). As described in detail below the direct funding of religiously affiliated teachers and counsellors has actually had the effects that this Court warned against.

It is abundantly clear that government funding of religiously infused teaching and counselling cannot be permitted consistent with the Establishment Clause. In Lemon v. Kurtzman, the Supreme Court invalidated a program that provided state aid to teachers of purely secular subjects in religiously affiliated schools, in part because the court found an impermissibly high risk that religious values and views might be transmitted to stu-

dents during instruction of mathematics, history and other secular subjects:

In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

403 U.S. at 617.

That rationale was reaffirmed and reinforced in Grand Rapids v. Ball:

[w]hether the subject is "remedial reading", "advanced reading" or simply "reading" a teacher remains a teacher and the danger that religious doctrine will become intertwined with secular instruction persists.

473 U.S. at 388, citing Meek v. Pittenger.

Amici submit that when the subjects are as value-laden and closely tied to religious tenets as sexuality, procreation and

family, the transmission of religious values is unavoidable. And, as the record amply reflects, the risk has not been avoided by AFLA in operation.⁷ AFLA programs have been

⁷ This rule does not require the court to find that potential AFLA grantees, who are affiliated with religious organizations, would intentionally violate the Establishment Clause. As the Supreme Court found in Lemon, it is not a matter of bad faith, but rather the inextricable combination of functions which precludes direct state aid to religiously affiliated teachers:

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to

(footnote continued)

presented in parochial schools and other religious settings which contain religious symbols. J.A. 114, 166, 170-171, 211, 412-13. Some AFLA programs were opened or closed by a priest with prayer, J.A. 248, 278.

For the sectarian grantees both the counsellor/teachers and the materials are subject to the specification of religiously affiliated supervisors and teachers, see J.A. 108-09 (grantee refused to alter religious content of program), 197, 284-85. The exercise of such control was fatal to the program invalidated in Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education, 413, U.S. 472 (1973) and Wolman v. Walter, 433 U.S. 299 (1977).

(footnote continued from previous page)
be essential to good citizenship
might well for others border on or
constitute instruction in religion.

403 U.S. 618-19

The record is replete with examples of explicitly religious material used in AFLA programs. Material produced or used by current AFLA grantees is explicitly religious, e.g., "47 Reasons to Wait," used by grantee Women's Choice:

1. God commands us to be pure . . .
5. God has set sex aside for the marriage relationship . . .
26. Jesus can fill the need for intimacy without sex . . .
30. It⁸ is poor testimony for Christ.

In a similar vein is the Woman's Choice publication, "37 Ways to Say No":

- • •
3. Build a relationship with Jesus so that your loneliness will be satisfied . . .
 8. Meditate on God's Word to be 'transformed by the renewing of your mind.' . . .

⁸ Material from current AFLA grantees, not contained in the Joint Appendix, has been lodged with the Court by NOW Legal Defense Fund.

21. Commit each date to the Lord; be Christlike and act like Jesus would if he were on a date.

The religiosity of this message is equivalent to the religious content of the Ten Commandments. Cf, Stone v. Graham, 449 U.S. 39 (1980).

AFLA Lacks Any Safeguards

As the District Court correctly found AFLA, perhaps alone among statutory programs challenged under the Establishment Clause, contains no restrictions whatsoever against the teaching of religion qua religion or any attempt to restrict the education and counselling process from "intentionally or inadvertently inculcating religious belief." 657 F.Supp. at 1562-63, (footnote omitted).

⁹ Material lodged, see n.8, supra.

In order to sustain a program which channels funds directly to religious institutions from facial attack under the Establishment Clause, the aided institutions must demonstrate the capability of separating secular and religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736, 766 (1976), or contain stringent safeguards to assure that state aid cannot be diverted to sectarian uses. These are very high standards that most religious organizations and institutions, including parochial elementary and secondary schools, are inherently incapable of achieving. Since AFLA does not, on its face, even attempt to limit participation to religious organizations that can separate religious and secular functions this test cannot be satisfied.

For any program involving government funding, the Establishment Clause demands stringent safeguards to assure that government aid for secular purposes cannot be diverted to or combined with uses that advance religion. Unless a government program provides aid to sectarian institutions which, by its nature, cannot be diverted to religious purposes, the government program must provide "effective means for guaranteeing" that aid "will be used exclusively for secular, neutral, and non-ideological purposes." Committee for Public Education v. Nyquist, 413 U.S. at 780; Larkin v. Grendel's Den, Inc., 459 at 125-26. An examination of the guarantees that have failed to past muster reveals that this requirement of guarantees is both fundamental and stringent. Lemon v. Kurtzman, 403 U.S. at 619 ("pervasive restrictions"); compare Levitt v.

Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (program for reimbursement of testing and scoring) with Committee for Public Educ. & Religious Liberty v. Reagan, 444 U.S. 646, 658 (1980).

The statute contains no safeguards that in any way can guarantee that federal funds will be used exclusively for secular, non-ideological purposes. Indeed, even if proffered, such guarantees would not be meaningful because the nature of the activities funded under AFLA -- teaching and counselling -- are so open ended that the possibility of an effective secular guarantee is precluded.

Committee for Public Educ. v. Nyquist, 413 U.S. at 780. Lemon v. Kurtzman, 403 U.S. at 618-19. School District Grand Rapids v. Ball, 473 U.S. at 387-88 (1985). As the District Court properly found, AFLA has not and cannot

provide such safeguards (657 F.Supp. at 1562-63), which is fatal to the statutory scheme.

Moreover, amici contend, based on the experience and operation of their own congregations, that the religious personnel most likely to apply for participation in AFLA are those who teach and counsel on matters of adolescent sexuality, pregnancy, and family life for their congregations, core religious functions from which secular functions cannot be separated.¹⁰

In sum, given: (1) the nature of the aid (direct financial payment); (2) the nature of the activities sponsored (counselling and teaching on matters of sexuality and family life); and (3) the nature of the institutions receiving the aid (churches and

¹⁰ The record reflects that priests (in clerical garb) and nuns have been principal presenters and administrators in AFLA sponsored programs. See J.A. 208, 278, 297.

other religious organizations, not students, parents, or individual participants in AFLA) and the lack of proferred or possible safeguards to guarantee that aid would be used solely in a secular, nonideological manner. This Court's precedents compel the conclusion that a direct effect of AFLA is to advance that religious purposes of religious grantees.

AFLA Constitutes An Endorsement of Religion

The danger which the Establishment Clause protects against is not only to creation of a monolithic national church but also the fusion of government and religion, which begins when government endorses or supports the theological tenets of one religion or several, over others. As this Court has said:

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of

government and religious functions or a concert or dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School District of Abington v. Schempp, 374 U.S. at 222.

AFLA, on its face and most clearly, in practice, has placed the government "behind the tenets" of some religious, to the detriment of amici and other religions. AFLA religious grantees and AFLA administrators consider that the government has endorsed their religiously based programs and approach (see e.g., J.A., 213 "Bishop Announces Grant . . . given for a new course in family centered sex education which will be offered to parish religious education programs . . ."), J.A. 120.

As this Court noted most recently in Grand Rapids v. Ball, supra, programs directed at children and adolescents, like AFLA, is subjected to particularly rigorous Establishment Clause scrutiny. "The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the government message are children in their formative years." 473 U.S. at 390 (footnote omitted). This Court and circuit Courts have fashioned an analytical distinction of constitutional dimension between programs involving college students or adults, and programs involving children and adolescents. School District of Abington v. Schempp, 374 U.S. at 252-53. ("This distinction warrants a difference inconstitutional results."); Engel v. Vitale, 370 U.S. 421 (1962); see Roemer v.

Maryland Public Works Board, 426 U.S. 736, 764, (1976).

Adolescents are less able to distinguish secular from sectarian functions. The risk is that adolescents will perceive government sponsorship of a program run by a religious organization as a government endorsement of that organization and its theology. Activities that are permitted on university campuses, such as voluntary prayer group meetings, are prohibited in secondary schools. Widmar v. Vincent, 454 U.S. 274 (1981); Brandon v. Board of Guilderland Central School, 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

Adolescence is a time of maturing, values clarification and the beginning independent decision making. Chief Judge Kaufman of the Second Circuit explained:

". . . Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, 'Tis Education forms the common mind,/Just as the twig is bent, the tree's inclin'd.' (Epistle to Lord Cobham)."

Brandon v. Board of Guilderland Central School, 635 F.2d at 978.

Amici submit that the same concerns are present when adolescents observe that one or several churches or religious organizations receive government funds for running a "secular" program for adolescents. It is inevitable that adolescents will perceive an expression of government approval for those denominations that participate in AFLA.

By providing government sponsorship of programs that employ teachers and counselors affiliated with particular churches, AFLA, in effect, assists those churches to "gain and keep adherents." School District of

Abington v. Schempp, 374 U.S. at 228 (concurring opinion of Douglas, J.). The Establishment Clause does not permit use of the government to advance religion in this manner:

The Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone.

Id. at 229. Government sponsorship of programs run by and identified with specific religious denominations will certainly have the effect of giving those denominations greater strength in recruiting adolescent members.

Bradfield v. Roberts, 175 U.S. 291 (1899), heavily relied on by the government and the intervenors, is not analogous. First, the activity involved in Bradfield, operating

a hospital, was found to be a secular activity performed pursuant to a secular charter. The activity is different in nature from teaching and counselling, which are core religious functions, in a way that hospital administration is not. Second, a crucial factor in Bradfield was the finding of non-discrimination -- that the benefits of the Congressional grant were available to all persons irrespective of religious belief. On this point as well, the distinction from AFLA is evident. Grants are not available to all religions that offer programs on adolescent sexuality and childbearing. (See Point II, supra). In addition, at least some AFLA programs have been limited to participation to adolescents of a particular religious faith.¹¹ Thus on

¹¹ This limitation is effected by, inter alia, publicizing the program exclusively or principally in church bulletins or letters to
(footnote continued)

its face and on the facts AFLA is distinguishable from Bradfield.

There is no suggestion in Bradfield that it is permissible for sectarian organizations performing purely secular functions use explicitly religious materials or in any way attempt to inculcate religious belief. As Bradfield has been interpreted by this Court it is apposite only in situations where the separation of secular and sectarian functions is not only theoretically possible, but also guaranteed by adequate statutory or programmatic safeguards. Cf, e.g., Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672, 676-77,

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members of a congregation, J.A. 117, 170, 204; or by presenting programs in parochial school classes, J.A. 412-13, or in place of the usual Confraternity of Christian Doctrine (CCD) classes, J.A. 408; or in religious education classes, J.A. 210.

679 (1971) (Act ensured aid would be devoted to secular functions.) AFLA contains no such guarantees or safeguards. Given the nature of the activities involved -- counselling and teaching -- such safeguards can never be effective since the activities are so close to the core of religious functions.

Amici submit that striking down AFLA will not end the participation by religious groups in providing necessary public welfare functions, any more than the consistent ban on State aid to parochial schools did. Religious organizations may constitutionally perform purely secular functions in a purely secular way (and may receive government funds in support of such activities.) This case does not present a compelling reason for this Court to depart from decades of settled precedent which proscribes direct aid to churches and paro-

chial schools for educational and counselling activities (because such subsidized activities invariably advance the religion); and government endorsement of particular religious views.

Lemon v. Kurtzman, supra; Meek v. Pittenger, supra and Aguilar v. Felton, supra, are more analogous authorities because the nature of the activities (teaching) are closer to what is offered though AFLA (teaching and counselling) and the nature of the aid is similar (direct grant, for programs and materials as well as teachers salaries). The problems presented by the nature of the aid and the nature of the institutions, i.e., advancement of religious purpose and inability to separate secular and religious functions were not present in Bradfield.

It is no defense to an Establishment Clause challenge that AFLA is in the nature of an experiment -- a small program to attempt a new approach to a vexing social problem. The liberty interests embodied in the Establishment Clause are fundamental, and their violation is irreparable. This Court has stated unequivocally that government may not experiment with sponsorship of religious solutions to secular problems:

". . . it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

Abington School District v. Schempp, 374 U.S. at 225 (citations omitted).

V.

AFLA COMPELS EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION

AFLA invites and indeed compels excessive entanglement of government and religion by encouraging and permitting grants to religious institutions. The Supreme Court has identified two components of this prong of the Lemon test: (1) whether the challenged programs involve administrative interference with surveillance of religious activities; and (2) whether the challenged program fosters political divisiveness. Lemon v. Kurtzman, 403 U.S. at 621-22. AFLA fails both parts of the entanglement test. In making these determinations, the Court has directed inquiry into three factors: the character and purposes of the aid recipients; the nature of the aid and the resulting relationship between government and religion. Id. at 615.

Two types of monitoring are a necessary part of an AFLA program: (1) routine financial auditing of the use of AFLA funds; and (2) surveillance to guarantee that AFLA programs are not used to transmit religious ideology. In this context both types of monitoring are excessively entangling.

Excessive administrative entanglement is inevitable when the government provides aid directly to religious organizations or institutions, as is permitted and encouraged by AFLA. All programs that receive government grants are subject to inspection and audit. Such necessary surveillance "creates an intimate and continuing relationship between church and state and an excessive entanglement." Lemon v. Kurtzman, 403 U.S. at 622.

AFLA involves the government in the review and approval of texts created by religious organizations for use in AFLA sponsored teaching and counseling. A large part of AFLA program is counseling or teaching. This Court has consistently recognized that it is impossible to monitor the content of a teacher's (or counsellor's) activities and speech without an excessive entanglement. Meek v. Pittenger, 421 U.S. 349, 370 (1975); Lemon v. Kurtzman, supra; Wolman v. Walter, 433 U.S. 299 (1977); Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School District v. Ball, 473 U.S. 373 (1985). This is true whether the teacher or counsellor is religiously affiliated or not.

The record shows and the government has conceded, that a number of AFLA programs are being presented in parishes and parochial

schools. J.A. 114, 166, 170-71, 210-11, 341, 408, 412-13, 518. The monitoring of those programs presents the precise entanglement problem that required invalidation in Aguilar v. Felton, Lemon v. Kurtzman, Meek v. Pittenger.

The inquiry that this Court must make regarding administrative entanglement is the same as that made in the parochial school aid cases, and the holdings in those cases must govern here. The most relevant factor is that the aid under AFLA goes directly to religious institutions, not to adolescents or parents. This type of aid is not less entangling than the following programs and practices, which have been held to excessively entangle government and religion: public employees providing remedial programs in non-public schools (Aguilar v. Felton, 473 U.S. at

408-14); subsidies to teachers of secular subject (Lemon v. Kurtzman, 403 U.S. at 615-18); the loan of equipment to non-public schools (Meek v. Pittenger, 421 U.S. 371); furnishing auxiliary remedial services (id. at 372); and providing non-participating supervision of students during voluntary prayer meetings (Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971, 979 (2d Cir. 1980).

In operation, the entanglement between government and religion in the administration of AFLA has been pervasive and overwhelming. Religious affiliated grant readers reviewed and made recommendations on proposals from both religious and secular grantees. J.A. 98, 103, 108-109, 113. The readers rejected some applications on the ground that religion was not sufficiently present.

J.A. 132-34, 135. Once grants were awarded, religious grantees submitted explicitly religious material to the supervising agency for approval for use in AFLA programs, and received such approval from the Government. (J.A. 630). In addition, government employees monitored (or should have monitored) programs which were given in parishes and parochial schools, including on-site inspections. This type of involvement is clearly entangling.

Even where monitoring of content is possible and effective, such supervision "inevitably results in the excessive entanglement of church and state, and Establishment Clause concern distinct from that addressed by the effect doctrine." Aguilar v. Felton, 473 U.S. 402, 409 (1985).

The entanglement involved in AFLA is far more extensive than the entanglement found

to be excessive in Aguilar, Lemon or Meek. AFLA supervision involves more than a set of rules and monthly unannounced visits to parochial school classrooms to monitor the performance of public school employees, see Aguilar v. Felton, 473 U.S. at 428 (O'Connor, J. dissenting). In addition to the normal financial monitoring, religious readers review applications, and government employees work with religiously affiliated persons to shape the content of AFLA programs. Disputes over the religious content of AFLA programs have led to the curtailment or dropping of programs.¹²

¹² At least one AFLA program has been defunded for being insufficiently religious, see J.A. 132-35, and at least one other was reprimanded and defunded for being too religious or accessible to only a limited group, see J.A. 742. Both of these examples reflect a degree of entanglement between government and religion which is intolerable under our constitutional framework: "state" inspection (footnote continued)

Moreover, AFLA possess the exact divisive political potential identified by the Supreme Court in Lemon -- "successive . . . appropriations that benefit relatively few religious groups." 403 U.S. at 623. While AFLA programs will not necessarily require "successive annual" appropriations, it is very likely that program grantees, including religious organizations, will seek continuing government support for both their individual grants and the AFLA program as a whole and, as a result, "political factions supporting and opposing the programs will divide along religious lines." Id. See also Meek v. Pittenger, 421 U.S. 349, 372.

(footnote continued from previous page)
and evaluation of the religious content of a religious organization creates a "relationship pregnant with the dangers of excessive government direction of . . . churches." Lemon v. Kurtzman, 403 U.S. at 620.

This Court need not engage in speculation of future controversy over AFLA funding in order to find constitutionally fatal political divisiveness. AFLA embodies not only the potential for future political divisiveness but a past history of highly charged political action to enact religious belief, which parallels the explosive political context of the school prayer cases. See Engel v. Vitale, 370 U.S. 421 (1962). This program has fostered political divisiveness in the communities where amici and plaintiff clergy live and worship, and operate their family life programs for adolescents in competition with the religious programs taking place in the parish or church school down the street which has been augmented by federal funds and benefitted by government endorsement. The phenomenon of political divisiveness inherent in AFLA on its

face and fulfilled in its practice is concrete, not elusive. Aguilar v. Felton, 473 U.S. at 429 (O'Connor, J. dissenting).

The constitutional principles of the religion clauses of the United States were shaped by recognition of the

. . . anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval. . .

Id. at 429.

AFLA fails both the administrative entanglement and political divisiveness tests of Lemon v. Kurtzman, and its progeny, and must be held to be unconstitutional on this ground as well.

CONCLUSION

For all of the foregoing reasons amici respectfully request this Court find

that AFLA violates the Establishment Clause of the united States Constitution.

Respectfully submitted,

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February 13, 1988

APPENDIX

APPENDIX

STATEMENT OF INDIVIDUAL AMICI

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December 1965) which declares:

". . . the civil authority must see to it that the equality of the citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

The Episcopal Women's Caucus ("EWC") is an organization of Episcopal laity, bishops, priests and deacons who are committed to the full inclusion of women in all aspects of life of the church and the world. The EWC and the Episcopal church as a whole have long been on record as strong supporters of the individual's right and responsibility to make

informed decisions concerning contraception and abortion. The EWC believes that AFLA will substantially interfere with efforts to allow people to make such well-informed decisions and will result in government-sponsored promotion of religious tenets, which are anti-ethical to the beliefs of our organization and the teaching of our church.

The Unitarian Universalist Association ("UUA") has its national headquarters in Boston, Massachusetts and represents 138,000 adherents of liberal religious values and has 1,010 churches with 1,047 clergy. The Unitarian Universalist Association seeks to join in this brief based upon its policy of amicus intervention in First Amendment cases. UUA is a member-organization of PEARL which is submitting a brief amici curiae.

The United Synagogue of America represents over 1.5 million Conservative Jews and over 800 Conservative congregations throughout the United States. It is deeply committed to the preservation of individual liberties and the separation of church and state. At its 1975 Biennial convention, a resolution was passed stating that "abortion involves very serious psychological, religious and social problems, but the welfare of the mother must always be our primary concern." The resolution emphasized that abortion is permissible under certain circumstances, particularly where the mother's physical or psychological health is threatened. The resolution also urged affiliated congregations to oppose any legislative attempts to weaken the force of the Supreme

Court's decision allowing for choice in this matter.